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A MAZE OF CONTRADICTIONS: CHINESE LAW AND POLICY IN THE DEVELOPMENT PROCESS OF PRIVATELY OWNED SMALL AND MEDIUM-SIZED ENTERPRISES IN CHINA

Jing Wang*

This article looks at flaws in the Law of China on Promotion of Small and Medium-Sized Enterprises 2002 (the Chinese Law on Promotion of SMEs 2002) and the Anti-Monopoly Law of China 2007 (the Chinese Anti-Monopoly Law 2007), as well as examining the inconsistencies between the State's industrial policy and the current legal framework for Chinese privately owned SMEs. Although legal protection for SMEs is not a new research area in China, little scholarship has been devoted to conflicts between "law" and "policy" from a relationship standpoint between State-owned enterprises (SOEs) and privately owned SMEs. It argues that these SMEs are less able than SOEs to obtain chances for robust growth due to their privileges and immunities. By ignoring the market function, but emphasizing the economic role of the State, and by offering no genuine sanctions for senseless intervention from the State's industrial policy, the Chinese Law on Promotion of SMEs 2002 and the Chinese Anti-Monopoly Law 2007 fail to establish fair competition circumstances for privately owned SMEs. Why cannot these two laws overcome the State's industrial policy? Different approaches to achieving dissimilar goals in the Chinese market would be the answer. Thus, this article demonstrates that administrative powers granted by the State's industrial policy are the biggest obstacle for privately owned SMEs, and then recommends methods to resolve this dilemma from the perspective of the Chinese Anti-Monopoly Law 2007.

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INTRODUCTION

This article explores the disadvantages of the current legal framework for privately owned small and medium-sized enterprises (SMEs)¹ in

1. In 2003, the publication “Interim Provisions on the Standards for Medium and Small Enterprises” (2003) gave the first definition of standards for classification of SMEs in China: SMEs are companies with turnover between RMB 30 million Yuan and RMB 400 million Yuan, and between 400 and 3,000 employees. In 2011, the new regulation, “Provisions on the Classification Standards for Small and Medium-Sized Enterprises,” not only claimed that SMEs included micro, small and medium-sized enterprises, but also offered more categories of SMEs classified by industry. Zhongxiao Qiye Huaxing Biaozhun Guiding [Provisions on the Classification Standards for Small and Medium-Sized Enterprises] (2011) (promulgated by the MIIT, the NBS, the NDRC and the Ministry of Finance, June 18, 2011, effective June 18, 2011), http://www.gov.cn/zwggk/2011-07/04/content_1898747.htm.

Table 1: Samples of Categories of Chinese SMEs in Different Industries

Industry Category	Enterprise Category	Headcount	Turnover (RMB Yuan)
Manufacture	Medium-Sized	< 1000	< 40 million
	Small	< 300	< 20 million
	Micro	< 20	< 3 million
Retail	Medium-Sized	< 300	< 200 million
	Small	< 50	< 5 million
	Micro	< 10	< 1 million
Information Transmission	Medium-Sized	< 2000	< 1000 million
	Small	< 100	< 10 million
	Micro	< 10	< 1 million

China,² as well as providing recommendations to reduce inconsistencies between Chinese laws and policies.³ The article abandons the conventional research perspective that *the Anti-Monopoly Law of China 2007* (the *Chinese Anti-Monopoly Law 2007*) provides monopoly exemptions⁴ to protect SMEs and expand their development spaces.

Id. (table devised by the author). See, e.g., [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), http://english.gov.cn/laws/2005-10/08/content_75040.html; see also [Interim Provisions on the Standards for Medium and Small Enterprises 2003] (promulgated by the State Econ. and Trade Comm'n, the Nat'l Dev. and Reform Comm'n, the Ministry of Fin. and the Nat'l Bureau of Statistics, Feb. 19, 2003, effective Feb. 19, 2003) (China); see also Zhongxiao Qiye Huaxing Biaoqun [Guiding Provisions on the Classification Standards for Small and Medium-Sized Enterprises] (promulgated by the MIIT, the NBS, the NDRC and the Ministry of Finance, June 18, 2011, effective June 18, 2011), http://qq.gov.cn/zwgk/2011-07/04/content_189847.htm (China).

2. Because of the unique economic and legal characteristics, the term "China" in this research refers solely to mainland China.

3. See LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 149 (David Kennedy & Joseph E. Stiglitz eds., 2013) (pointing out that sound economic policy must be restricted and underpinned by law).

4. [The Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 13–15.

Article 13 Any of the following agreements among undertakings competing with each other are prohibited:

- (i) fixing, or changing the price of products;
- (ii) limiting the output or sales of products;
- (iii) allocating the sales markets or the raw material purchasing markets;
- (iv) limiting the purchase of new technology or new facilities, or the development of new products or new technology;
- (v) jointly boycotting transactions;
- (vi) other monopolistic agreements identified by the antimonopoly authorities. For the purposes of this Law, monopoly agreements include agreements, decisions and other "concerted conducts designed to eliminate or restrict competition.

Article 14 Any of the following agreements between an undertaking and a counter party are prohibited:

Rather, it devotes to an area where research is lacking and examines the SME legal protection from the perspectives of administrative interventions and privately owned SME's relationships with State-owned enterprises (SOEs).⁵

Essentially, parts one and two of the article focuses on the legal flaws in the *Law of China on Promotion of Small and Medium-Sized Enterprises 2002* (the *Chinese Law on Promotion of SMEs 2002*)⁶ and the *Chinese Anti-Monopoly Law 2007*.⁷ These two laws are expected to promote privately owned SMEs, but they fail to do so because they emphasize the economic role of the State and offer no genuine sanctions for senseless administrative intervention. This article therefore analyzes the relationship between the *Chinese Anti-Monopoly Law 2007* and industrial policy in the process of privately owned SMEs' growth, in part three. Having argued that the Chinese industrial policies grant too many privileges and immunities to SOEs and administrative agencies, and interrupt the normal growth of privately owned SMEs, part four of this article demonstrates that these unilateral interventions should be limited and changed by relevant laws in the future.

- (i) fixing the price for resale;
- (ii) restricting the lowest price for resale;
- (iii) other monopolistic agreement identified by the antimonopoly authorities.

Article 15 Agreements among undertakings with one of the following objectives shall be exempted from the application of article 13, 14 if [it can be proved to be in any of the following circumstances] . . .

- (iii) agreements made by small and medium-sized enterprises to improve operational efficiency and to enhance their competitiveness.

5. The basis for comparison of SOEs and privately owned SMEs in China is that the State-owned economy exited from SMEs by the end of the Eleventh Five-Year Plan period (2006–2010). Shao Ning, *Shiyiwu Yangqi Gaige he Shierwu Silu* [Central SOE Reform during 11th Five-Year Plan and the Process for 12th Five-Year Plan], PRESS CONFERENCE OF THE STATE COUNCIL INFORMATION OFFICE (Feb. 22, 2011), <http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/2011/0222/>.

6. See generally [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises].

7. See generally [The Anti-Monopoly Law of the People's Republic of China].

I. A BLIP FOR CHINESE PRIVATELY OWNED SMES: THE *CHINESE LAW ON PROMOTION OF SMES 2002*

Going back to the early period of China's SMEs, from the beginning of 2002⁸ to the end of 2007⁹, the SMEs grew at their fastest pace,¹⁰ and reached a new high in both quantity and quality.¹¹ A series of policies on the promotion of SMEs,¹² and the *Chinese Law on Promotion of SMEs*

8. The year 2002 became a milestone of the Chinese establishment of the SMEs' legal framework because the first SME promotion law, the *Chinese Law on Promotion of SMEs 2002*, was adopted. See [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises].

9. The reasons why the fastest pace ended in 2007 can be summarized as follows: (1) after the late-2000s global financial crisis, the tendency of *Guojin Mintui*, "the State advances while the private sector retreats," fully emerged in China. Michael Wines, *China Fortifies State Businesses to Fuel Growth*, N.Y. TIMES (Aug. 30, 2010), <http://www.nytimes.com/2010/08/30/world/asia/30china.html>. In order to exploit SOEs advantages to improve the economy in such a background, China invested billions of dollars to promote SOEs. *Id.* (2) The *Chinese Law on Promotion of SMEs 2002* has flaws in limiting administrative actions (see sub-section B. *The Legal Flaws in the Chinese Law on Promotion of SMEs 2002* in Section I below). (3) The *Chinese Anti-Monopoly Law 2007* fails to remedy the legal flaws in the *Chinese Law on Promotion of SMEs 2002* (see sub-section B. *Challenges for Chinese Privately Owned SMEs – Disobedient SOEs and Administrative Agencies* in Section II below).

10. ZHONGGUO ZHONGXIAO QIYE FAZHAN BAOGAO (2008-2009) [CHINA'S SME DEVELOPMENT REPORT (2008-2009)] 7, 39-40 (Li Zibin et al. eds., 2009).

11. As regards quantity, SMEs have accounted for 99% of all Chinese enterprises from 2003 onward. As regards quality, SMEs provided approximately 60% of Chinese GDP in 2007, which had increased by nearly 10% since 2001. Research Group of China SME Index of Economic Development, *Preface to ZHONGGUO ZHONGXIAO QIYE JINGJI FAZHAN ZHISHU YANJIU BAOGAO* (2005) [RESEARCH REPORT ON CHINA SME INDEX OF ECONOMIC DEVELOPMENT (2005)] (2008).

12. Chinese SME promotion policies include [Several Opinions of the State Council on Cultivating the Social Service System of SMEs] (2000) and [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs] (effective Aug. 24, 2000). See, e.g., Mingxia Chi, [9 Issues in Implementing the 11th Five-Year Plan for SME Growth Project], CHINA BUSINESS TIMES (Dec. 30, 2005), www.xinhuanet.com. The publication "the 12th Five-Year Plan for SME Growth" (2011-2015) aimed to improve the development environment and enhance the viability, competitiveness and sustainability of SMEs. The policy document [Several Statements of the State Council on Further Promoting the Development of SMEs] (2009) repeated that SMEs are a major force in China's economic and social development. See *Several Opinions of the State Council on Further Promoting the Development of Small-and Medium-Sized Enterprises*, LAW INFO CHINA (2009), <http://www.lawinfochina.com/display.aspx?lib=law&id=8147&CGid=>.

2002, made a significant contribution to SME growth. However, this momentum did not last long, because the *Chinese Law on Promotion of SMEs 2002* had some unavoidable legal flaws,¹³ which will be analyzed below.

A. A Dreamlike Period for Chinese SMEs between 2000 and 2007

In the Spring of 2000, a State's first individual policy on SME promotion, 'Several Statements of the State Council on Cultivating the Social Service System of SMEs' (2000),¹⁴ was released and started a period of SMEs' prosperity.¹⁵ This policy was designed in the interest of Chinese SMEs, and it enhanced their sustainability and established multi-

13. See [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] art. 6, 7, 13.

Article 6 . . . No unit may, in violation of laws and regulations, charge fees to or impose fines on small and medium-sized enterprises, nor collect money or things of value from them. The enterprises shall have the right to refuse to make the payment and the right to report and make accusations related to violations of the provisions mentioned above.

Article 7 Administrative departments shall safeguard the lawful rights and interests of small and medium-sized enterprises, protect their right to participate in fair competition and transaction according to law, and they may not discriminate against the enterprises or add unequal conditions to their transactions. . . .

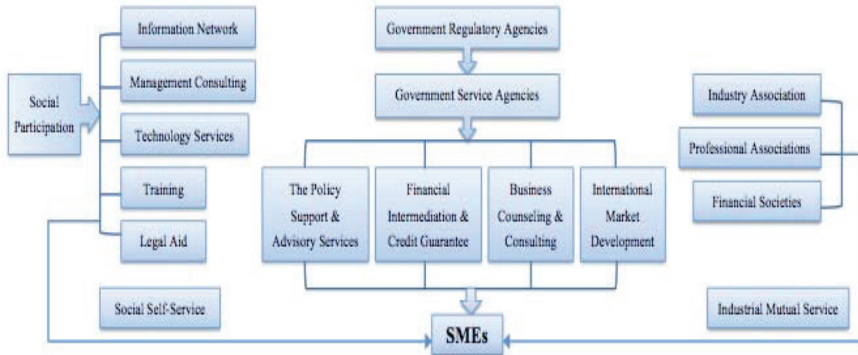
Article 33 The State gives guidance to, promotes and regulates the restructuring of the assets of small and medium-sized enterprises through merges, purchases, etc., in order to optimize the allocation of resources.

14. Chinese SME promotion policies include [Several Statements of the State Council on Cultivating the Social Service System of SMEs].

15. Interview with a Chinese scholar on SME policy, in Beijing, China (Oct. 22, 2012) (the scholar did not allow the researcher to use his name in any written work arising from the study, but did consent to being interviewed).

level, multi-channel, and multi-function social networks for these SMEs.¹⁶

Figure 2: An Expected Social Service System of SMEs in China¹⁷



However, establishing a successful ‘Social Service System of SMEs’ was a long road from concept to practice. And this policy emphasized the role of Central Government and local governments at, or above, the county level in the SMEs’ promotions process.¹⁸

16. From then on, several supporting systems for SMEs, such as finance support, technical support, marketing support, administrative support, etc., have been steadily improved in China. See, e.g., *id.*; see also Xiao Jianzhong & David Smallbone, *Regional Variations in the Environment for Entrepreneurship Development: A Tale of Three Cities in China*, 56TH WORLD CONFERENCE OF THE INTERNATIONAL COUNCIL FOR SMALL BUSINESSES [ICSB] sec. 2.2 (2011).

17. YAO OUYANG ET AL., ZHONGGUO ZHICHI ZHONGXIAO QIYE FAZHAN DE ZHENGCE HE FUWU TIXI YANJIU [RESEARCH ON IMPROVING POLICIES AND SERVICE SYSTEM FOR SUPPORTING SME’S DEVELOPMENT IN CHINA] 195 (2009) (figure translated from Chinese by the author).

18. Andrew Atherton & David Smallbone, *State Promotion of SME Development at the Local Level in China: An Examination of Two Cases*, 2 J. OF CHINESE ENTREPRENEURSHIP 225–26 (2010).

Table 3: The Administrative Divisions of Mainland China (at and above the County Level)¹⁹

Country Level	Provincial Level	Prefectural Level	County Level
The Central Government of China	Provinces	Sub-Provincial Level Cities Prefectural Level Cities Autonomous Prefectures	Districts Counties County Level Cities Autonomous Counties Special Districts Banners Autonomous Banners
	Autonomous Regions	Prefectural Level Cities Autonomous Prefectures	
	Municipalities	Prefectural Level Cities Districts/Counties	

In the Summer of 2000, another State’s policy, ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000),²⁰ which developed SOEs and at the same time supported privately owned SMEs,²¹ came into effect. However, too much economic power and too many rights were granted to the Chinese governments,²²

19. See *The Local Administrative System*, CHINA’S POLITICAL SYSTEM, <http://www.china.org.cn/english/Political/28842.htm> (last visited Feb. 27, 2017) (table devised by author).

20. [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs].

21. The publication “Several Statements of the State Council on Encouraging and Promoting the Development of SMEs” ought to be a good way to develop SOEs and privately owned SMEs in a balanced way toward establishing collaboration and complementary industry groups. *Id.* In 2002, SMEs captured over 95% of the total amount of enterprises in China, an increase of 0.2% compared with 2001. Concurrently, the total profit of SMEs rose more than 33% from the previous year. See, e.g., *id.*

22. See, e.g., IP/97/348, European Commission Press Release, Improving and Simplifying the Business Environment for Business Start-ups (Apr. 24, 1997) (pointing out that “many regulations have been brought into force over the last 20 years and, together with administrative procedures, they have had a cumulative effect on enterprises

so that any local government at, or above, the county level could guide the development approach of local SMEs within their administrative regions.²³ This led to a situation whereby SME growth could rely mainly on administrative interventions. However, despite the policy having a negative influence on the Chinese market, the development of SMEs for the period between 2002 and 2007 was extremely significant. These two SME policies were the forerunners in the process toward the Chinese SMEs' legal framework establishment.

In 2003, the first law on the promotion of SMEs, the *Chinese Law on Promotion of SMEs 2002*, came into effect in order to improve the business environment for SMEs and to determine active and lawful support for SME growth.²⁴ Since then, support for developing SMEs has occupied a higher priority at *the legal level* in China. Accordingly, SMEs

which has stifled their daily operations and affected their competitiveness...the burden is disproportionately heavy on smaller enterprises...").

23. Xiao Jianzhong & Smallbone, *supra* note 16.

24. [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382128.htm.

Article 1 This Law is enacted for the purpose of improving the business environment for small and medium-sized enterprises, promoting their sound development, creating more job opportunities in both urban and rural areas, and giving play to the important role of such enterprises in national economic and social development.

Article 2 For purposes of this Law, small and medium-sized enterprises refer to the different forms of enterprises under different ownerships that are established within the territory of the People's Republic of China according to law, that help to meet the social needs and create more job opportunities, that comply with the industrial policies of the State and that are small and medium-sized in production and business operation

Article 3 With regard to small and medium-sized enterprises, the State applies the principles of active support, strong guidance, perfect service, lawful standardization and guaranteed rights and interests, in order to create a favorable environment for their establishment and development."

experienced increasing profits in 2004.²⁵ However, the *Chinese Law on Promotion of SMEs 2002* also encouraged the local governments and agencies to improve services for SMEs.²⁶

At the beginning of 2005, China released one additional industrial policy, which was related to SMEs' development, namely 'Several Statements of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy' (2005).²⁷ This was a landmark decision, determining that privately owned SMEs were a vital component of the Chinese market economy and an important propeller of the State's

25. Joint Research Group on SME's Development, 2005 *Zhongguo Feigong Jingji Chengzhangxing Zhongxiao Qiye Fazhan Baogao* [The Report of China's SME's Development and Growth (2005)], SHENZHEN STOCK EXCHANGE, CHINA (Dec. 1, 2005), <http://www.szse.cn/main/aboutus/bsyw/zxqyszlt/200512017960.shtml> (pointing out that the value of Chinese SMEs in 2004 was nearly 2.5 times that of 2001, a 34.4% average annual growth).

26. See [Law of the People's Republic of China on Promotion of Small and Medium-sized Enterprises] art. 38–42.

Article 38 The State encourages all sectors of the society to establish and improve the service system for small and medium-sized enterprises and to provide them with services.

Article 39 The government shall, in light of actual needs, support the institutions established in the service of small and medium-sized enterprises and see that they provide top-notch services to the enterprises.

Article 40 The State encourages the various kinds of public intermediary agencies to provide the small and medium-sized enterprises with ... services

Article 41 The State encourages related institutions and institutions of higher education to train managerial, technical and other personnel for small and medium-sized enterprises

Article 42 The self-regulating trade organizations shall actively serve the small and medium-sized enterprises.

27. Chinese SME promotion policies include [Several Opinions of the State Council on Cultivating the Social Service System of SMEs].

productive forces.²⁸ Subsequently, the positive trend for SMEs continued over the following two years.²⁹ In 2006, the Central Government of China put forward the first ‘SME Growth Project’,³⁰ a clearer and more systematic SME policy than the previous policies, which would push SMEs to develop in the long-term.³¹ In addition, one further measure extremely beneficial to SMEs was adopted, namely the *Law of China on Enterprise Income Tax 2007* which proposed to reduce taxes for SMEs.³²

Due to so many Chinese industrial policies and laws on the promotion of SMEs, SMEs increased at the fastest pace since the very beginning of the 21st Century.³³ However, the development of SMEs was not always smooth or straightforward because the *Chinese Law on Promotion of SMEs 2002* failed to establish the idea of *fair competition* and the *limitation for inappropriate intervention*. When inappropriate administrative directives considered the State’s short-term economic interest that was partially presented by SMEs, especially in the first global financial crisis of the 21st Century, China’s privately owned SMEs were unable to avoid the fate of being marginalized by the State. Therefore, for the sake of improving the legal support for privately owned SMEs, it is essential to appreciate the legal flaws in the *Chinese Law on Promotion of SMEs 2002*.

28. *See id.*

29. Liu Xiangfeng, *SME Development in China: A Policy Perspective on SME Industrial Clustering*, in *SME IN ASIA AND GLOBALIZATION* 37–68 (2007).

30. [9 Issues in Implementing the 11th Five-Year Plan for SME Growth Project].

31. *See e.g.*, Zhongguo Guomin Jingji he Shehui Fazhan Shiyiwu Guihua Gangyao [The Outline of the Eleventh Plan for National Economy and Social] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 14, 2006, effective Mar. 14, 2006), http://www.gov.cn/ztlz/2006-03/16/content_228841_15.htm.

32. *See generally* [Enterprise Income Tax Law of the People’s Republic of China (revised)] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Jan. 1, 2008), http://www.fdi.gov.cn/1800000121_39_3339_0_7.html. “Article 28 As regards a small meagre-profit enterprise satisfying the prescribed conditions, the enterprise income tax shall be levied at a reduced tax rate of 20%.” *Id.* art. 28.

33. In 2007, the number of Chinese industrial SMEs experienced an increase of nearly 24% compared to 2005. *See* CHINA’S SME DEVELOPMENT REPORT (2008-2009), *supra* note 10, at 39–40. During the same period, the gross value of industrial output of Chinese SMEs represented an increase of over 46% compared to 2005. *Id.*

B. The Legal Flaws in the *Chinese Law on Promotion of SMEs 2002*

1. *Emphasizing the State and Ignoring the Market*

Under the semi-government-oriented economic growth model, the idea of the market mechanism is not deeply rooted in the Chinese traditions and culture.³⁴ Hence, for China, in the progress toward drafting the *Chinese Law on Promotion of SMEs 2002*, overlooking certain functions of the market's mechanisms was inevitable. In effect, the phenomenon of emphasizing the State's function, while ignoring the market mechanisms, permeates the *Chinese Law on Promotion of SMEs 2002*.

First of all, the *Chinese Law on Promotion of SMEs 2002* lacks the idea of fair competition. Following this Law, the State committed to promoting the business cooperation of large-scale SOEs and privately owned SMEs.³⁵ Using Japanese experience for guidance, this has been a successful approach,³⁶ with restrictions toward the risks of vertical

34. After practicing a "Planned Economy Model" for more than thirty years from 1952, China spent a long time transforming its "Planned Economy Model" into the "Market Economy Model." See, e.g., CHINA LEARNS FROM THE SOVIET UNION, 1949-PRESENT 164 (Thomas P. Bernstein & Hua-yu Li eds., 2010); see also *China Continues to Promote Opening-Up and Innovation*, THE STATE COUNCIL OF CHINA, http://english.gov.cn/premier/news/2016/03/22/content_281475312341145.htm (last updated March 22, 2016). In 1993, the Central Government held that the State should pay more attention to the market mechanisms and the competitive order. CHINA'S DEEP REFORM: DOMESTIC POLITICS IN TRANSITION 239 (Lowell Dittmer & Guoli Liu eds., 2006).

35. [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] art. 32.

Article 32 The State encourages and supports large enterprises to establish, on the basis of resources allocation by the market, stable relations of cooperation with small and medium-sized enterprise in respect of the supply of raw and semi-processed materials, production, marketing, and technological development and updating, in order to help promote the development of small and medium-sized enterprises.

36. Japan used the "Supplier System" to develop SMEs in the manufacturing industries: SMEs worked as subcontractors to large-scale enterprises and in most cases

integration.³⁷ However, this was not the case because unrestrained cooperation under the *Chinese Law on Promotion of SMEs 2002* existed before 2008 (when the *Chinese Anti-Monopoly Law 2007* came into effect); in fact, during the period between 2003 and July 2008, hardly any Chinese law or policy sought to limit this cooperation approach.³⁸ Consequently, in the process of cooperation China's SOEs, and their corresponding privately owned SMEs *in the same industry*, could form a *vertical monopoly group* and thereby create barriers to entry and obstacles to fair competition.³⁹ After 2008, although the *Chinese Anti-Monopoly Law 2007* was implemented, nothing was changed in the *Chinese Law on Promotion of SMEs 2002*.⁴⁰ *Administrative mergers* in the steel industry confirmed this.⁴¹

both of them achieved a win-win situation. See, e.g., Hiroshi Ueno et al., *Supplier System and Innovation Policy in Japan*, in *SMALL FIRMS AND INNOVATION POLICY IN JAPAN* (Cornelia Storz ed., 2006).

37. See YUAN HONGLIN, WANSHAN ZHONGXIAO QIYE ZHENGCE ZHICHI TIXI YANJIU [STUDY ON IMPROVEMENT OF POLICY SUPPORT SYSTEM IN SMES] 148 (2010).

38. "[I]n 2003, the Ministry of Commerce ('MOFCOM') and the National Development and Reform Commission ('NDRC') enacted, respectively, the Provisional Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors and the Provisional Regulation on the Prohibition of Price Monopolistic Conduct which contain rules on merger review and prohibition of price monopolies." Shang Ming, *Antitrust in China – A Constantly Evolving Subject*, 5 COMPETITION L. INT'L 4, 5 (2009). However, none of them focused on the business cooperation of large-scale SOEs and privately owned SMEs.

39. *Id.*

40. Before the *Chinese Anti-Monopoly Law 2007* was enacted in 2007, there was another effective law to maintain fair competition, the *Law of China against Unfair Competition 1993*. See [Law of the People's Republic of China Against Unfair Competition]. This was a significant point in the development of Chinese competition policy and law. However, this Law, which pays more attention to the principles of voluntariness, equality, impartiality, honesty, and even the public commercial morality, merely concerned the cooperation between large-scale SOEs and privately owned SMEs. See *id.* Therefore, the *Chinese Anti-Monopoly Law 2007* has been considered as the first law ought to concern this cooperation.

41. In the 21st Century, since the first Chinese policy concerning the restructuring of domestic steel enterprises was released in 2005, the desires and demands of the State have always affected its approach without it thinking about the need for fair competition and the survival situation of steel SMEs. Subsequently, without regarding the *Chinese Anti-Monopoly Law 2007*, the [Steel Industry Revitalization Plan of China] (2009) was released. It aimed (1) to form more than three large-scale undertakings (with a production capacity of more than 50 million tonnes) and about seven medium-scale

Second, the *Chinese Law on Promotion of SMEs 2002* does not change the existing approach toward the growth of SMEs: SME growth still relies mainly on decision-making by way of administrative directives, especially support from the State's industrial policy. Because the *Chinese Law on Promotion of SMEs 2002* (Article 33) emphasizes the powers and functions of the State,⁴² *promoting SMEs' growth* in this Law means taking initiatives to give priority to industrial policy. A negative conclusion is not difficult to draw, based on a side-by-side comparison.

On the positive side, in order to solve a chronic problem of SMEs, namely their short lifespan, the *Chinese Law on Promotion of SMEs 2002* emphasized the powers and functions of the State.⁴³ As market participants, realizing short-term profit maximization is the ultimate goal for most privately owned SMEs.⁴⁴ However, in a brutally competitive market, making profits is a tricky issue for those SMEs. In order to make a quick profit in a short time, a large number of them abandon "the principle of good faith",⁴⁵ such as honesty and other public commercial morality,⁴⁶ while instead devoting their time to selling counterfeit

undertakings (with a production capacity of 10 to 30 million tonnes) in the steel industry by 2011; and (2) to raise the output of the top ten large steel undertakings to over 60% of total Chinese steel output by 2015, from 44% in 2009. Several Chinese mainstream media reported that the mergers of steel companies under this plan were *Administrative Mergers*. See, e.g., Gangtie Chanye Tiaozheng he Zhenxing Guihua [Steel Industry Revitalization Plan of China] (promulgated by the SETC, Mar. 20, 2009, effective Mar. 20, 2009), http://www.gov.cn/zwgk/2009-03/20/content_1264318.htm; He Rongliang, *Gangtie Dachongzu de Sige Yinyou* [Four Malaises of the Chinese Steel Mergers], THE ECON. OBSERVER (Sept. 8, 2009), <http://www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml>.

42. [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises].

43. ZENG WEI, ZHONG XIAO QI YE SHENG CUN ZHUANG KUANG DIAO CHA BAO GAO [AN INVESTIGATION ON THE STATUS OF MEDIUM AND SMALL ENTERPRISES] 18 (2009).

44. *Id.* at 35.

45. [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382128.htm. "Article 9 small and medium-sized enterprises shall observe professional ethics, abide by the principle of good faith, work hard to raise their business level and increase the ability to develop themselves." *Id.*

46. [AN INVESTIGATION ON THE STATUS OF MEDIUM AND SMALL ENTERPRISES], *supra* note 43, at 35. "[Because of minimal marketing, poor quality products could be

products. Predictably, giving up integrity is shortsighted behavior in terms of SMEs' development. Extravagant profits may only lead them to shutdowns. Accordingly, there is an average lifespan of approximately three years in China's privately owned enterprises.⁴⁷ Facing such a grim reality, the *Chinese Law on Promotion of SMEs 2002* realized that although establishing the integrity of privately owned SMEs was an extremely challenging task, it was time to commence the journey toward that goal.

On the negative side, after 2003, when the *Chinese Law on Promotion of SMEs 2002* came into effect, the *government-oriented approach*, rather than the *legal-oriented approach*, remained and determined the fates of privately owned SMEs.⁴⁸ Hence, a competitive market environment is not what has emerged. For example, in 1999 in the Chinese gas station sector, the State decided to *enhance* the market share of petrol SOEs in the refined oil retail market and *reduce* the number of privately owned gas stations, through administrative directive powers.⁴⁹ Moreover, after the *Chinese Law on Promotion of SMEs 2002* came into force, a further decline in gas stations ownership occurred.⁵⁰

profitable; SME bosses are able to accumulate wealth under such circumstances. A lot of SME bosses only make the focus on profits, and treat SMEs as money-making tools]." *Id.*

47. HUANG MENGFU, ZHONG GUO SHANG HUI FA ZHAN BAO GAO No.1 (2004) [THE DEVELOPMENT REPORT OF NON-STATE-OWNED ENTERPRISES IN CHINA No.1 (2004)] 411 (2005).

48. *See, e.g.*, [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises]. "Article 33 *The State gives guidance to, promotes and regulates the restructuring of the assets of small and medium-sized enterprises through merges, purchases, etc., in order to optimize the allocation of resources.*" *Id.* art. 33.

49. The order [Order No. 38 of 1999] granted exclusive rights to petrol SOEs to control the oil resources in China from 1999. *See* Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian (关于清理整顿小炼油厂和规范原油成品油流通秩序的意见) [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products (Order No.38 of 1999)] (promulgated by the SETC, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the State Administration for Industry and Commerce (SAIC), the State Administration of Taxation (SAT) and the Quality and Technical Supervision Bureau, July 7, 1999, effective July 7, 1999), <http://www.mofcom.gov.cn/aarticle/b/d/200304/20030400082182.html>.

50. By the end of 1998, about 56,300 privately owned gas stations existed in the Chinese refined oil retail market, occupying more than 60 percent of the market share. However, by the end of 2006, privately owned gas stations only accounted for less than 50 percent of the total number in China. *See, e.g.*, Changjie Liu & Xiangdong Zhang,

Overall, therefore, the *Chinese Law on Promotion of SMEs 2002* has never improved the fate of privately owned SMEs on a long-term basis. The State's industrial policy has continued to increase its influence. However, without developing sound market rules and limiting administrative interventions, Chinese privately owned SMEs do not exist in a fair market and find it difficult therefore to achieve a genuine competitive advantage. Thus, reliance merely on the *Chinese Law on Promotion of SMEs 2002* cannot reproduce the high growth that SMEs achieved from 2000 to 2007.⁵¹

2. No Genuine Sanctions for Inappropriate Administrative Directives in China

The *Chinese Law on Promotion of SMEs 2002* lacked sanctions against those who issued inappropriate administrative directives, and also failed to offer legal remedies for privately owned SME victims. In particular, Article 4 of the *Chinese Law on Promotion of SMEs 2002* states that the State Council and the local governments (at or above the county level) could guide and serve SMEs located within their respective administrative territories.⁵² Because of regional differences in China, different local governments may pursue different intervention models to

Zhongshiyou Zhongshihua Niansui Banshu Minying Jiayouzhan [Chinese Oil SOEs Crushed Half of Private Gas Stations], THE ECON. OBSERVER (Apr. 8, 2006), <http://finance.sina.com.cn/chanjing/b/20060408/11192485151.shtml>; see also Li Zhichuan, *Zhongguo Minying Shiyou Qiye Fazhan Zhuangkuang he Qianjing Zhanwang [Development and Prospect of Chinese Private Owned Oil Enterprises]*, 2012 INT'L PETROLEUM ECON. 4 (2012).

51. HONGLIN, *supra* note 37, at 149.

52. [Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises] art. 4.

Article 4 The related departments under the State Council shall, according to the policies and overall planning of the State for small and medium-sized enterprises and within the scope of their respective functions and responsibilities, provide guidance and services to such enterprises. Local people's governments at or above the county level, the administrative departments under them in charge of work in respect of enterprises and other departments concerned shall, within the scope of their respective functions and responsibilities, provide guidance and services to small and medium-sized enterprises.

promote local SMEs, and then protect local interests. Such a situation often results in conflict within different administrative areas.⁵³ Hence, the adoption of inappropriate administrative directives affecting privately owned SMEs results in the market mechanisms being ignored, leading to an unhealthy development environment for SMEs.

However, for the protection of those adversely affected by inappropriate administrative directives, genuine sanctions are definitely absent in the *Chinese Law on Promotion of SMEs 2002*. Article 7 of the *Chinese Law on Promotion of SMEs 2002* stresses that administrative agencies shall not discriminate against SMEs or add unequal conditions to transactions of SMEs;⁵⁴ however, without including strong punitive measures in the law, this far-reaching Article remains an empty threat. Article 6 of this law holds that when faced with inappropriate administrative directives, SMEs shall have the right to refuse, report and accuse, in cases of violations by administrative authorities who issue inappropriate administrative directives to their higher administrative authorities.⁵⁵ However, nothing would happen after that, because it is the norm for officials to shield one another, so for administrative authorities that issue inappropriate administrative directives, admitting or even correcting mistakes is typically difficult by their higher administrative authorities.⁵⁶ Therefore, because both Articles 6 and 7 of the *Chinese Law on Promotion of SMEs 2002* are dysfunctional Articles for the protection of SMEs, there are no genuine sanctions against the infringers and no legal remedies for SME “victims.”

Regrettably, the SMEs’ nightmare does not end there. In order to “whitewash” the above-mentioned flaws in the *Chinese Law on*

53. See Song Shengxia, *Hebei Province Under Antitrust Investigation*, GLOBAL TIMES BUS., CHINA (Sept. 15, 2014), <http://www.globaltimes.cn/content/881412.shtml> (pointing out as a by-product of the Chinese planned economy, administrative monopoly exists in almost all aspects of the State’s economy. However, this should be forbidden).

54. [Law of the People’s Republic of China on Promotion of Small and Medium-Sized Enterprises].

55. *Id.*

56. Similar articles exist in the *Law of China against Unfair Competition 1993* as well. See, e.g., [The Law of China against Unfair Competition 1993] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 30, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm.

Promotion of SMEs 2002, an official statement was issued in China:⁵⁷ this Law was a basic law in the area of support for SMEs, which only established a framework and many provisions in it were exhortations without actual effects and called for further improvements.⁵⁸

Even worse, the flaw of having no genuine sanctions in the *Chinese Law on Promotion of SMEs 2002* was exacerbated by a further expansion in the war between the State's industrial policy and this Law, because essentially, enacting the *Chinese Law on Promotion of SMEs 2002* did not mean that China would consistently "Think Small First."⁵⁹ Instead, the State's industrial policy is an unbeatable foe, and the *Chinese Law on Promotion of SMEs 2002* is always on the back foot. For instance, going through the full text of the Chinese 'Policies for the Development of Iron and Steel Industry' (2005), one sees that it focused on how to make large-scale enterprises bigger and stronger.⁶⁰ Despite this policy being released three years after the *Chinese Law on Promotion of SMEs 2002*, the Law did not have any positive effect on it.⁶¹ In comparison with the State's short-term interest, SMEs' future was completely ignored in the steel industry by this policy.⁶²

In summary, although around the time of the enactment of the *Chinese Law on Promotion of SMEs 2002*, SMEs saw a period of rapid development (2002–2007) on account on new State-sponsored SME promotion policies, this Law still had flaws, and failed to adequately

57. Lei Dongjun, *Jiedu Zhongxiao Qiye Cujinfa* [*The Interpretation of the Law of China on Promotion of SMEs*], CHINA SCIENCE DAILY, 1, 1 (2002).

58. *Id.*

59. ENTERPRISE AND INDUSTRY, EUROPEAN COMMISSION, THINKING BIG FOR SMALL BUSINESSES: WHAT THE EU DOES FOR SMEs 4 (2011), <http://ec.europa.eu/DocsRoom/documents/874/attachments/1/translations/en/renditions/pdf> ("the 'Think Small First' principle . . . means listening to SMEs before introducing new laws, examining the effect legislation will have on small businesses, and helping companies in need of support.")

60. *Policies for the Development of Iron and Steel Industry*, ASIANLII.ORG, <http://www.asianlii.org/cn/legis/cen/laws/pfdoiasi501/> (last visited May 15, 2017).

61. The author makes this statement because the Policies for the Development of Iron and Steel Industry (2005) which did not mention steel SMEs even once, made " . . . consolidation of the industry a priority." See, e.g., *id.*; see also ALAN H. PRICE ET AL., THE CHINA SYNDROME: HOW SUBSIDIES AND GOVERNMENT INTERVENTION CREATED THE WORLD'S LARGEST STEEL INDUSTRY (2006), http://www.ssina.com/news/releases/pdf_releases/chinese_steel_subsidies_paper.pdf.

62. *Id.*

protect and promote SMEs affected by either inappropriate administrative directives or SOE actions. Consequently, in order to foster market mechanisms and limit the impact of administrative directives, the State urgently needed to enact the *Chinese Anti-Monopoly Law* in the hope that it could bring a “second spring” for privately owned SMEs.

II. HELPFUL OR UNHELPFUL – THE *CHINESE ANTI-MONOPOLY LAW 2007* FOR PRIVATELY OWNED SMES

Because more and more economic activities have been carried out in the Chinese market and have increasingly affected competition levels there since 1978, the Central Government of China felt that the market required an anti-monopoly law. The State Council began to draft a proposal for an *Anti-Monopoly Law* as early as 1994.⁶³ However, the formulation of the *Chinese Anti-Monopoly Law* was surrounded by controversy and was a prolonged process. Before the *Chinese Anti-Monopoly Law 2007* was first promulgated in 2007, several laws and policies concerned with fair competition were published in China in the 1990s and 2000s.⁶⁴ However, these laws and policies did not provide

63. XIAOYE WANG, *THE EVOLUTION OF CHINA’S ANTI-MONOPOLY LAW* 260 (SSAP trans., Edward Elgar Publ’g Ltd. 2014) (2010).

64. These included the [Law of the People’s Republic of China Against Unfair Competition], [Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities] (promulgated by State Council, Apr. 21, 2001, effective Apr. 21, 2001), CLI.2.35595(EN) (Lawinfochina), [Decisions of the State Council on Rectifying and Standardizing the Order in the Market Economy] (promulgated by State Council, Apr. 27, 2001, effective Apr. 27, 2001), CLI.2.35594(EN) (Lawinfochina). *See, e.g.*, [Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities]. “These Provisions are formulated with a view to establishing and perfecting the market system which is unified all over the country, provided with fair competition, and which is well-ordered, and to prohibiting the acts of regional blockade in the market economic activities, getting rid of regional blockade and maintaining the order of socialist market economy.” *Id.* at art. 1. *See also* [Decisions of the State Council on Rectifying and Standardizing the Order in the Market Economy]. “In order to further deepen the reform and expanding the opening to the outside world, create a good environment for the national economic development vigorously and healthily, the State Council hereby decides, in light of China’s present situation of the order in the market economy, to rectify and standardize the order in the market economy throughout the country.” *Id.*

unified guidance on the issue of fair competition in China.⁶⁵ Such a situation was not resolved until 2007, when a comprehensive legal set of market rules, the *Chinese Anti-Monopoly Law 2007*, was finally adopted.⁶⁶

Nevertheless, and significantly, when the *Chinese Anti-Monopoly Law 2007* came into force in 2008, it was obvious that the Law did not meet SME expectations. The thirteen-year incubation period (1994–2007) did not help matters, either.⁶⁷ On the contrary, the law had several significant drawbacks and there remained much room for improvement. Firstly, there was not sufficient understanding of the exemption of agreements among SMEs.⁶⁸ Secondly, there was a lack of effective sanctions in the law against those who issued inappropriate administrative directives to impede the growth of privately owned SMEs: this Law has failed to stop SOEs and administrative agencies from abusing their exclusive rights.⁶⁹ The result is that, partially affected by the imperfect *Anti-Monopoly Law 2007*, China's privately owned SMEs' pace of development has slowed since 2008, after a period of rapid growth in the previous six years.

65. See MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 95 (2005) (describing the situation of Chinese competition laws and policies as a “patchwork of miscellaneous laws and regulations that seek to prevent the most damaging anti-competitive activities found in the transitional Chinese economy . . .”) (internal citation omitted).

66. See, e.g., Mark Williams, *China*, in THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 88, 109 (Mark Williams ed., 2013) (“A common issue that concerned consumers, private Chinese producers and foreign entrants to the domestic Chinese market was to ensure that SOEs were not exempted or afforded special treatment under the law.”); see also H. STEPHEN HARRIS ET AL., ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 1 (2011).

67. Huang Xiaowei, *Fanlongduanfa Chutai shi Fanlongduan de Qidian* [The Chinese Anti-Monopoly Law Promulgated: the Starting Point against Monopolistic Behavior], SOUTHERN WEEKEND, CHINA, Sept. 16, 2007, at C16.

68. [The Anti-Monopoly Law of the People's Republic of China].

69. See, e.g., DEBORAH HEALEY, ACADEMIC SOCIETY FOR COMPETITION LAW, *A Comparative Look at the Competition Law Control of State-Owned Enterprises and Government in China*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 147 (Josef Drexler et al. eds., 2011); see also HARRIS ET AL., *supra* note 66, at 178.

A. SMEs – Protection Features which the *Chinese Anti-Monopoly Law 2007* Cannot Ignore

In the past, whether anti-monopoly law should concern SMEs or not provoked considerable debates.⁷⁰ Due to their scale, protecting SMEs was basically considered a meaningless feature of anti-monopoly law.⁷¹ However, with the blossoming of the “Structure-Conduct-Performance” (SCP) Paradigm⁷², SMEs became important elements in anti-monopoly

70. See, e.g., RICHARD A. POSNER, ANTITRUST LAW 26 (2nd ed. 2001) (pointing out that “[t]he best overall antitrust policy from a small-business standpoint is no antitrust policy”); see also ACADEMIC SOCIETY FOR COMPETITION LAW, THE GOALS OF COMPETITION LAW 73 (Daniel Zimmer ed., 2012) (pointing out that “[t]here are not many other specific instances in secondary legislation or individual cases where SME protection is explicitly mentioned. Nevertheless, the policy objective is still present in EU competition law.”); see also HARRIS ET AL., *supra* note 66, at 82–83 (pointing out that the Chinese anti-monopoly law improves SMEs).

71. See POSNER, *supra* note 70, at 26.

72. See generally HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (3rd ed. 2005) (noting that the SCP Paradigm (see Table 4 below) emerged in the 1930s at Harvard University, developed in the 1950s, and blossomed in the 1960s). Based on this Paradigm, Professor Hovenkamp concluded that “[a]ntitrust without structural analysis has become impossible.” *Id.* at 46.

Table 4: Brief Table of the SCP Paradigm

Structure (Number and Size Distribution of Firms) →	Conduct (Behavior of Firms) →	Performance (Market Power)
Number of firms	Pricing	Production efficiency
Number of buyers	R&D	Allocative efficiency
Number of products	Advertising	Product quality
Entry barriers	Choice of technology	Profits

law.⁷³ Thus, so far, the consensus is that anti-monopoly law should protect the positive growth of SMEs.⁷⁴

In Article 15(3) of the *Chinese Anti-Monopoly Law 2007*, the law provides exemptions to agreements among SMEs;⁷⁵ specifically, any agreement or category of agreements among SMEs which satisfies the following two conditions shall be exempted from the scope application of Articles 13 and 14 of the *Chinese Anti-Monopoly Law 2007*, namely where (1) any agreement or category of agreements among SMEs does not afford such SMEs the possibility of eliminating competition in respect of a substantial part of the products in question; and (2) any agreement or category of agreements among SMEs allows consumers a fair share of the resulting benefit.⁷⁶ According to the literal interpretation of the above-mentioned Articles, the *Anti-Monopoly Law 2007* seems to protect SMEs. However, is that an accurate assessment?

In order to address this issue, the objectives and purposes of the *Chinese Anti-Monopoly Law 2007* need to be examined. In general, competition policy and law have multiple objectives: besides economic objectives, the wishes of society, the State's culture and history, institutions in the State, and perceptions of the State, are all targets that competition policy and law take into consideration.⁷⁷ Nonetheless, from the beginning of the 21st Century, the objectives of competition policy and law have gradually concentrated on two special areas: consumer

73. See, e.g., Hammond E. Chaffetz, *The Antitrust Laws and Small Business*, 2 SEC. ANTITRUST L. 77 (1953) (pointing out that "small businesses are increasingly concerned about the problems of compliance with the antitrust laws"); see also MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* §§ 3, 12 (1990) (maintaining that treating SMEs' development and anti-monopoly law separately may lead to inefficiency, which is harmful to the market activity and the competitive mechanism).

74. See, e.g., *Press Releases 2005: SMEs Missing out on Benefits of Competition: Campaign Launched to Highlight Importance of Competition Law*, OFFICE OF FAIR TRADING (May 24, 2005), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2005/92-05>; see also *Putting Small Businesses First: Europe is Good for SMEs, SMEs are Good for Europe*, EUR. COMM'N (2008), <http://ec.europa.eu/DocsRoom/documents/2278/attachments/1/translations/en/renditions/pdf>; see also WANG XIAOYE, FANLONGDUANFA [COMPETITION LAW] 5–9 (2011).

75. [The Anti-Monopoly Law of the People's Republic of China].

76. *Id.*

77. CHRISTOPHER TOWNLEY, ARTICLE 81 EC AND PUBLIC POLICY 1 (2009).

welfare and efficient allocation of resources.⁷⁸ However, no matter where this issue goes, among all of the objectives, the economic objective is, in practice, the most essential one.⁷⁹ Without it other objectives may not be achieved.

Turning the focus to the *Chinese Anti-Monopoly Law 2007*, privately owned SMEs provoke debates on the economic objectives of this law. The first point of discussion is the relationship between consumer welfare and the “public interest”⁸⁰ – the reconciliation of competing interests⁸¹ between the State’s interest and those of the enterprises and

78. See, e.g., Commission Communication Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 13, 87 (now Article 101(3) TFEU).

13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

...

87. The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers. In some cases a certain period of time may be required before the efficiencies materialise. Until such time the agreement may have only negative effects. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.

See also Case T-168/01, *GlaxoSmithKline Services Unlimited v. Comm’n*, 2006 E.C.R. II-2969, 3104, 3064.

79. According to the OECD Global Forum on Competition and UNCTAD, economic efficiency, rather than other goals that may achieve the “public interest,” such as protecting small and medium-sized enterprises or cultural goals, is becoming increasingly important in competition systems all over the world. See, e.g., WANG XIAOYE, *supra* note 74, at 26–27; see also TOWNLEY, *supra* note 77, at 13.

80. John B. Kirkwood, *The Goals of Antitrust: The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2431–32 (2013).

81. Interview with a Chinese scholar on The Anti-Monopoly Law of China, in Beijing, China (Oct. 22, 2012) (pointing out that balancing all interests in the Chinese market may be a modality to achieve the “public interest”) (the scholar did not allow the

consumer welfare. Although the *Chinese Anti-Monopoly Law 2007* identifies “public interest” as its final goal,⁸² there still exists an obvious question: Is the “public interest” in the *Chinese Anti-Monopoly Law 2007* somewhat broader than consumer welfare? The second debate is that from the angle of Article 15(3): What was the core area of economic objectives in the *Chinese Anti-Monopoly Law 2007*, when Chinese legislators adopted the exemption to agreements among SMEs? Regarding the protection of competitors or effective competition, how could one guarantee fair competition and economic efficiency simultaneously in the Chinese market for privately owned SMEs and SOEs?⁸³

It is essential to consider in detail SMEs’ functions on the “public interest.” *First*, as the main driving forces for increasing Chinese market activity,⁸⁴ the existence of privately owned SMEs is conducive to improving consumer welfare. *Second*, privately owned SMEs create job opportunities and improve living standards for their employees, which contribute to the realization of social welfare.⁸⁵ *Third*, because SOEs and

researcher to use her name in any written work arising from the study, but did consent to being interviewed); see also Luo Zhaojing, Development of Abuse of Administrative Power to Eliminate or Restrict Competition in the Anti-Monopoly Law of the People’s Republic of China and the Impact of Article 106 of EU Competition Law and Free Movement Rules (2013) (unpublished Ph.D. dissertation, University of Glasgow).

82. See [The Anti-Monopoly Law of the People’s Republic of China] art. 13–15.

83. See, e.g., Morris A. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1289 (1948) (“Although the maintenance of effective, or ‘workable,’ competition is generally considered as not the only, perhaps not even the most important, object of antitrust policy, exclusion of the wider social and political objects from this discussion . . . is more than a matter of mere convenience.”); see also J.M. Clark, *Toward a Concept of Workable Competition*, 30 THE AM. ECON. REV. 241 (1940).

84. See PORTER, *supra* note 73.

85. By the end of 2008, Chinese SMEs were playing a vital role in employment. Since then, the SMEs’ proportion of total employment has accounted for over 75 percent. See, e.g., Huang Yufeng, WOGUO ZHONGXIAOXING QIYE DE JIEGOUXING KUNJING JI DUICE YANJIU <(我国中小型企业结构性困境及对策研究)> [RESEARCH ON RESPONSE TO STRUCTURAL PROBLEMS IN CHINA’S SMEs] 16 (2010).

privately owned SMEs can be considered as two distinguishable types of enterprise in the Chinese market, an increase in privately owned SMEs could be the equivalent to a decrease in SOEs.⁸⁶ The same argument applies to their interests, which may balance the current unbalanced situation between these two groups of enterprise. Consequently, apart from consumer welfare, privately owned SMEs can also promote other objectives of the *Chinese Anti-Monopoly Law 2007*, such as welfare of employees and interests of enterprises, as well as balancing these objectives to ultimately realize the “public interest.”⁸⁷

However, if protecting SME operators were one of the purposes of the *Chinese Anti-Monopoly Law 2007*, the State could therefore be accused of giving executive protection and strong support to SME operators. In this case, the interests and welfare of SME operators would be particularly important in China. What if too many SMEs appeared in the market? Since SMEs are always associated with low efficiency, considering the interests and welfare of SMEs operators too much is not a very wise course of action in most instances. Therefore, although privately owned SMEs are eager for State intervention to improve their conditions, excessive protection for them would undermine effective competition in some sense.⁸⁸

Conversely, if promoting effective competition were to be one of the State’s major objectives for supporting the development of SMEs, giving specific support to SMEs could be considered as a method of promoting Chinese economic development. A review of the State’s economic

Table 5: Chinese SMEs’ Proportion of Total Non-Agricultural Employment 2008-2011

Year	2008	2009	2010	2011
SMEs’ Proportion of Total Non-Agricultural Employment (%)	78	75	80	Nearly 80

CHINA POPULATION & EMPLOYMENT STATISTICAL Y.B. 2010 for 2008–2009 data, RESEARCH ON RESPONSE TO STRUCTURAL PROBLEMS IN CHINA’S SME for 2010 datum, RESEARCH REPORT ON CHINA’S SMEs 2011 (2011) (table devised by the author).

86. See Shao, *supra* note 5.
87. WANG XIAOYE, *supra* note 74.
88. ZHONGGUO FANLONGDUANFA SHISHI REDIAN WENTI YANJIU [RESEARCH ON HOT ISSUES OF ENFORCEMENT OF CHINA’S ANTI-MONOPOLY LAW] 10 (Wang Xianlin ed., 2011).

development in the last century indicates that although SOEs may get China onto the fast track to success, privately owned SMEs are also one of the economic powers, one which cannot be ignored.⁸⁹ Promoting effective competition under the *Chinese Anti-Monopoly Law 2007* will therefore offer an opportunity to achieve balanced economic growth: all kinds of Chinese enterprises will acquire a genuine opportunity to realize their realistic goals and enjoy the fair competition in the market.

B. Challenges for Chinese Privately Owned SMEs – Disobedient SOEs and Administrative Agencies

If understanding of the exemption to the agreements among SMEs (Article 15(3) of the *Chinese Anti-Monopoly Law 2007*) could be considered an awareness issue, the inability of SMEs to stop SOEs and administrative agencies abusing their exclusive rights should be regarded as one of the legal mishaps of the *Chinese Anti-Monopoly Law 2007*. For SOEs and administrative agencies, although the *Chinese Anti-Monopoly Law 2007* does forbid the phenomenon of abusing dominant positions (Articles 7, 8 & 32–37),⁹⁰ administrative powers ignore this requirement in order to create smooth-surface growth for SOEs.⁹¹ Such a trend may enhance the interests of SMEs over a limited time, as well as the State's short-term interests. However, for the State's sustainable and sound

89. Guanyu 1996 nian Guoqi Gaige Gongzuo de Shishi Yijian [Notice of Opinions on 1996's SOE Reform Implementation] (promulgated by the St. Econ. & Trade Comm'n, Dec. 14, 1995, effective Jan. 1, 1996), <http://www.gov.cn/gongbao/shuju/1996/gwyb199609.pdf> (China) (pointing out "big is the best" has been to some extent shaken).

90. Article 8 of the *Anti-Monopoly Law of the People's Republic of China* states, "[n]o administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition." [The Anti-Monopoly Law of the People's Republic of China] art. 8. Articles 32–37 of the same Law reiterate that administrative organs or organizations must not abuse their administrative power to eliminate competition in the Chinese market. *Id.* art 32–37.

91. See Angela Huyue Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 631, 632 (2011).

development, it is not an intelligent choice.⁹² Therefore, EU competition law limits this phenomenon.⁹³

However, on this issue in the *Chinese Anti-Monopoly Law 2007*, there are no genuine sanctions against SOEs and administrative agencies. When they make excessive administrative intervention in specific economic development activities in the market involving privately owned SMEs, the costs of violations are extremely low. Consequently, the following two sections aim to analyze the administrative powers within the *Chinese Anti-Monopoly Law 2007*, which is commonly abused in order to undermine the growth of privately owned SMEs in the market.

1. Arrogant Chinese Administrative Agencies – A Lack of Restraint on the Chinese Anti-Monopoly Law 2007

In order to protect SOEs in traditional State-owned industries that are concerned with the lifeline of the national economy and security, many administrative agencies in China have been granted rights to intervene in economic development.⁹⁴ The State-Owned Assets Supervision and

92. See Maurice E. Stucke, *Are People Self-Interested? The Implications of Behavioral Economics on Competition Policy*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 3, 15–20 (Josef Drexler et al. eds., 2011).

93. For example, the Treaty on the Functioning of the European Union effectively forbids undertakings abusing dominant positions. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, October 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]. Article 106 of TFEU states that “[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties . . .” *Id.* art. 106. Case RTT v. GB-INNO-BM gave a brilliant example of the abuse of dominant positions. Case C-18/88, Régie des Télégraphes et des Téléphones (RTT) v. GB-Inno-BM SA, 1991 E.C.R. I-5973, ¶¶ 17–20. In this case, although the State law allowed the undertaking to have control over the ancillary market, this ran contrary to EU competition law. *Id.* ¶ 20. As a result, the European Court of Justice (ECJ) forbade the abusive behavior of the public undertaking. *Id.* See also Case C-41/90, Höfner v. Macrotron GmbH, 1991 E.C.R. I-2010, ¶ 28; Case C-260/89, Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE) v. Dimotiki Etairia Pliroforissis (DEP), 1991 E.C.R. I-2951, ¶ 31; Case C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG, 1993 E.C.R. I-5841, ¶ 14; Wentong Zheng, *State-Owned Enterprises Versus the State: Lessons from Trade Law*, in COMPETITION AND THE STATE 75, 76 (Thomas K. Cheng et al. eds., 2014).

94. WANG, *supra* note 63, at 288.

Administration Commission of the State Council of China (SASAC), the supreme governing body of State assets, is one of those agencies.⁹⁵ Chinese local governments, which would be granted rights to supervise the local industrial structure and the growth of SOEs within their administrative territory, become additional administrative agencies with the ability to bring about economic intervention. However, their interventions, which focus on their own areas and interests, may disturb fair competition in the relevant market.⁹⁶ Therefore, the *Chinese Anti-Monopoly Law 2007* ought to provide adequate restrictions over these agencies. Disappointingly, hitherto those administrative agencies which have the right to intervene in the market have acted outside the *Chinese Anti-Monopoly Law 2007*.

Because the SASAC and local governments can simply ignore the *Chinese Anti-Monopoly Law 2007* in the restructuring process of SOEs,⁹⁷ they easily undermine privately owned SMEs. For example, one year before the *Chinese Anti-Monopoly Law 2007* was launched, the SASAC published an additional SOE policy, titled ‘Guiding Opinions of the State-Owned Assets Supervision and Administration Commission of the State Council about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-Owned Enterprises’ (2006), on the organization of SOEs.⁹⁸ On the one hand, this policy was intended to enliven the State-owned SMEs and to establish a withdrawal mechanism for inferior enterprises. On the other hand, this policy was also

95. The main functions of the SASAC are supervising and managing central SOEs, performing investor’s responsibilities for the state-owned assets, pushing forward the reform and restructuring of SOEs, improving corporate governance, propelling the strategic adjustment of the structure of the Chinese economy, and so on. *Main Functions*, SASAC, CHINA, <http://en.sasac.gov.cn/n1408028/n1408521/index.html> (last visited Apr. 11, 2017).

96. Song Shengxia, *supra* note 53.

97. See generally Sebastian Heilmann, *Experience First, Laws Later: Experimentation and Breakthroughs in the Restructuring of China’s State Sector*, in *GOING PRIVATE IN CHINA: THE POLITICS OF CORPORATE RESTRUCTURING AND SYSTEM REFORM* 95, 98–103 (Jean Oi ed., 2011).

98. Guanyu Yujin Guoyou Ziben Tiaozheng he Guoyou Qiye Chongzu de Zhidao Yijian, [Guiding Opinions of the State-Owned Assets Supervision and Administration Commission of the State Council about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-Owned Enterprises] (promulgated by the State Council, Dec. 5, 2006, effective Dec. 5, 2006), http://www.gov.cn/gongbao/content/2007/content_503385.htm.

committed to speeding up the restructuring of large-scale SOEs and improving the approval procedures for them.⁹⁹ Accordingly, the SASAC grants excessive administrative rights to local governments (at or above the prefectural level) and they use their excessive power and rights to intervene in the restructuring of local SOEs. However, at the same time, there is hardly any Chinese law or legal authority that has a legitimate remit to constrain such excessive administrative intervention. Even worse, although there was hope that after the *Chinese Anti-Monopoly Law 2007* was enacted, this irrational situation would gradually disappear, the reality was to the contrary: SOEs have simply become larger and larger (see Figure 6 below),¹⁰⁰ and are squeezing the economic space for privately owned SMEs to operate in local markets.¹⁰¹ Because the merger of local SOEs may reduce competition level in the relevant market, local privately owned SMEs probably have to face the fact that their survival conditions will get progressively worse. The restructuring

99. *Id.*

100. *National Data*, NATIONAL BUREAU OF STATISTICS OF CHINA (May 8, 2017), <http://data.stats.gov.cn/english/easyquery.htm?cn=C0> (figure devised by author). Because SOEs are selected winners created by State intervention, protected SOEs are unable to grow significantly. Although Figure 6 shows how much progress was made in the assets of State-held industrial enterprises between 2004 and 2011, the return on equity (ROE) of SOEs was only close to one half of that of non-SOEs in the second half of the first decade of the 21st century (see Table 7 below).

Table 7: ROE of Chinese SOEs and the Private Sector between 2006 and 2010

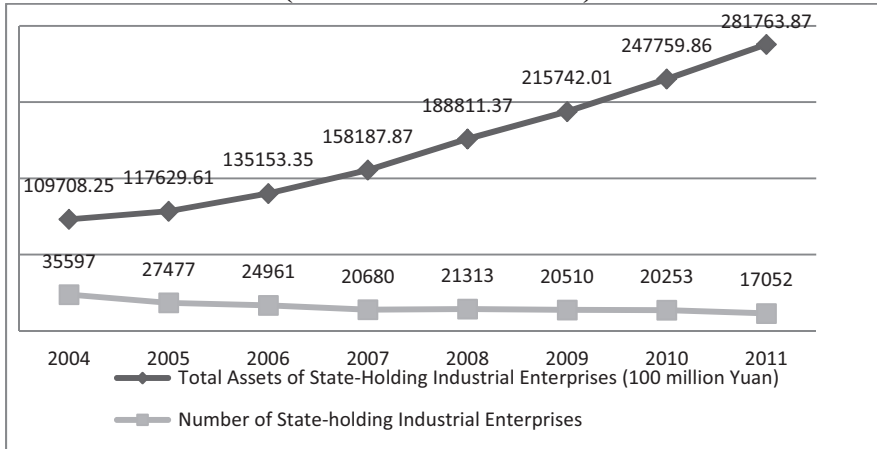
Year	2006	2007	2008	2009	2010
ROE of SOEs (%)	15.53	16.97	12.42	11.42	16.07
ROE of the Private Sector (%)	22.12	26.08	30.06	26.36	32.59

Id. (table devised by the author); see generally U.N. Conference on Trade and Development, Ifran ul Haque, *Discussion Papers: Rethinking Industrial Policy*, UNCTAD/OSG/DP/2007/2 (Apr. 2007); see also *Main Economic Indicators of State-Holding Industrial Enterprises by Industrial Sector (2003-2011)*, NATIONAL BUREAU OF STATISTICS OF CHINA (March 5, 2015), <http://data.stats.gov.cn/english/easyquery.htm?cn=C01>; see also Zhao Changwen, *Guoqi Xiaolv Wenti Touxu* <[国企效率问题透析]> [An Efficiency Analysis of SOEs], 15 PEOPLE’S TRIBUNE, CHINA 32 (2012).

101. See, e.g., Development Research Center of the State Council, ZHONGXIAO QIYE FAZHAN [THE DEVELOPMENT OF SMALL AND MEDIUM ENTERPRISES] 6 (2011); see also ZHONGGUO JINGJI GAIGE 30 NIAN: MINYING JINGJI JUAN (1978–2008) [CHINA’S 30 YEARS OF REFORM: VOL. OF THE PRIVATE ECONOMY 1978-2008] 218–20 (Zhou Liquan & Xie Siquan eds. 2008).

in the Chinese steel industry could easily demonstrate this unwelcome prospect.¹⁰²

**Figure 6: Assets of State-Holding Industrial Enterprises 2004–2011
(RMB 100 million Yuan)**



Second, the SASAC seeks a legal basis in the *Chinese Anti-Monopoly Law 2007* to cover illegal intervention in central SOEs. In 2003, the SASAC announced that the structural adjustment of central SOEs should be improved by reducing their total number.¹⁰³ However, at the present time (2015), the SASAC has not yet achieved its targets.¹⁰⁴ There are still

102. In Hebei province, China, the provincial government aimed to merge and decrease both State-owned and privately owned steel enterprises located in the province, from over 200 in 2003 to 15 by the end of 2015, without considering market rules. See [Steel Industry Revitalization Plan of China]; see also *supra* text accompanying note 41.

103. YONG ZHEN, CHINA'S CAPITAL MARKETS 210 (2013).

104. According to the SASAC, the number of central SOEs ought to have shrunk by at least 34% and dropped to 80–100 by the end of 2010. Additionally, this figure would be further reduced in the period of the Twelfth Five-Year Plan. It was expected that the number of central SOEs should be within the range of thirty to fifty. See, e.g. Li Rongrong, *Guoziwei: 2007 Zhongguo Zhongyang Qiye Jiang Jiasu Chongzu* [The SASAC will Accelerate the Restructuring of Central SOEs in 2007], CENT. PEOPLE'S GOV'T CHINA (Jan. 19, 2007), http://www.china.com.cn/policy/txt/2007-01/19/content_7681508.htm; see also Li Baomin, *Shierwu Qijian Zhongdian Gaige Longduan Hangye Guoyou Qiye* [Deepening SOE Reform in Monopoly Industries during

112 central SOEs in China.¹⁰⁵ After reviewing this State-oriented structural adjustment of central SOEs, we can assert that there were both positive and negative impacts arising from the *Chinese Anti-Monopoly Law 2007*.

The positive aspect has been that in the process of the adjustment, the SASAC, with the aim of turning central SOEs into completely market-oriented enterprises in the following 10–15 years,¹⁰⁶ has not completely ignored market mechanisms: in this process, the SASAC intends firstly to ensure *the quality* of the adjustment, rather than *the quantity* of central SOEs. Thus, the intended reduction in the number of central SOEs has not been achieved.

However, the negative aspect has been that, despite the *Chinese Anti-Monopoly Law 2007* coming into force in 2008, the SASAC removed nearly all legal restrictions to SOE mergers. In relation to the SASAC's attitude, the SASAC alone and different levels of Chinese government control mergers between, or among, central SOEs and local SOEs. This is puzzling to officers working in the anti-monopoly agencies when considering the *Chinese Anti-Monopoly Law 2007*.¹⁰⁷ On the one hand, the officers consider that SOEs ought to comply with the *Chinese Anti-Monopoly Law 2007*. On the other hand, the officers also hold that the *Constitution of China 2004*¹⁰⁸ and the *Chinese Anti-Monopoly Law 2007*¹⁰⁹ give special protection to SOEs.

the Twelfth Five-Year Period], CHINA ECON. NET (Oct. 30, 2010), http://www.ce.cn/xwzx/gnsz/zg/201010/30/t20101030_21930576.shtml.

105. *Zhongyang Qiye Minglu* [*The List of Chinese Central SOEs*], SASAC, CHINA (Mar. 15, 2015), <http://www.sasac.gov.cn/n1180/n1226/n2425/>.

106. Tian Zhiming, *Guozhiwei Mingque Yangqi Gaige Silu: Yangqi Jiang Xishu Shangshi* [*The SASAC Made the Idea of Central SOE Reform Clear: How to Become Listed Companies*], SOUTHERN DAILY, CHINA, Feb. 24, 2011, at A16.

107. See, e.g., ZHONG GANG, FANLONGDUANFA HUOMIAN ZHIDU YANJIU [ON THE EXEMPTION IN ANTI-MONOPOLY LAWS] 58 (2010); see also Thomas R. Howell et al., *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y J. 53, 90 (2009).

108. Article 7 of the *Constitution of China 2004* affirms that "the State ensures the consolidation and growth of the State economy." XIANFA art. 7, (2004) (China).

109. [The Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 7, http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (mentioning that for the sake of national or economic security, this Law protects the State economy);

However, such statements must be questioned, when pursuing the final objectives and purposes of *the Constitution of China 2004* and the *Chinese Anti-Monopoly Law 2007*.¹¹⁰ The SASAC should not indiscriminately use administrative powers and rights to intervene in the restructuring of SOEs.¹¹¹ Both the *Constitution* and the *Anti-Monopoly Law* in China exist to advance the protection of the sound and rapid development of the national economy, not the safeguarding of the State's short-term interest. Though the core reason that the SASAC proposes to strengthen SOEs' development is to ensure national or economic security, SOEs' prosperity does not necessarily equate to the blooming of the national economy. Pessimistically speaking, the actual competitiveness of SOEs, which have been developing fast under State intervention, could not be strong enough.¹¹² SOEs, as market participants,¹¹³ ought to strictly follow the market rules and laws¹¹⁴ like other participants. However, administrative agencies that have the power to intervene the market often favor SOEs in the name of State interest.¹¹⁵ Thus, with regard to the competition between SOEs and privately owned SMEs, if SOEs and administrative agencies ever step out of line, the *Chinese Anti-Monopoly Law 2007* will sooner or later counter-attack. Consequently, the core rules in the Chinese market should follow the

see also Li Rongrong, *Guoqi Gaige Fabuhui* [SOE Reform Press Conference], CHINA CENTRAL TELEVISION (Aug. 10, 2008), <http://news.cctv.com/china/20080810/105950.shtml>.

110. Interview with Chinese scholar in Beijing, China (Oct. 21, 2012) (the scholar did not allow the researcher to use his name in any written work arising from the study, but did consent to being interviewed); see also Zhen Qinggui, *Guoqi Gaizhi Gaige Bixu Yifa Jingxing* [State-Owned Enterprise Reform Must be Carried out According to Law], 37 CHINA ECON. WKLY. 16 (2014).

111. See, e.g., Thomas R. Howell et al., *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y J. 53, 84 (2009); see also HARRIS ET AL., *supra* note 66, at 24.

112. See, e.g., Gao Xu, *State-Owned Enterprises in China: How Big are They?*, WORLD BANK (Jan. 19, 2010), <http://blogs.worldbank.org/eastasiapacific/state-owned-enterprises-in-china-how-big-are-they>; see also Gabriel Wildau, *Chinese Economy Slows Again as Beijing Seeks New Path to Growth*, FIN. TIMES (Asia), Apr. 16, 2015, at 1.

113. Sun Jin Zhangtian, *Guanyu Fanlongduanfa dui Longduan Guoqi Shiyong Wenti de Sikao* [Reflections on the Application of Anti-Monopoly Law to Monopoly State-Owned Enterprises], 8 FAZHI YANJIU 51 (2014).

114. See, e.g., *id.*

115. WANG, *supra* note 63, at 288.

Chinese Anti-Monopoly Law 2007, which ought not to sit idly by and allow such a situation to continue.¹¹⁶

However, regrettably, things have not turned out the expected way. The semi-government-oriented economic growth model is hard to shake in China. The SASAC has drifted even further and further down that road, and put forward a development plan for the mergers of SOEs at the end of 2011 and beginning of 2012 (the SASAC's development plan). For the purposes of expansion, the "joint power" of the State-owned economy, the SASAC stresses complementary advantages and the powerful combination of central SOEs and local SOEs.¹¹⁷ It is not difficult to foresee that the integration of the State-owned assets will be bound to bring about mergers and monopolies in the Chinese market.¹¹⁸

116. HARRIS ET AL., *supra* note 66, at xii (maintaining that the *Chinese Anti-Monopoly Law* is "known as the Economic Charter").

117. Until September 2013, approximately fifteen of Chinese provincial governments, such as Zhejiang, Guangxi, Shanxi, Qinghai, etc. had signed a [Cooperation Memorandum] with SASAC and several framework agreements with some central SOEs. *See, e.g.*, Qu Lili (曲丽丽), *Guoziwei Antui Yangqi Zhenghe Difang Guozi Gouzhu Jianguan Dageju* (国资委秘密推动国有中央企业和地方国有企业的一体化) [*The SASAC Secretly Pushes the Integration of the State-Controlled Central Enterprises and Local SOEs*], CHINA BUS. J., Jan. 16, 2012, at A2; *see also* Guowuyuan Guoziwei yu Zhejiang Shengzhengfu Qianshu Hezuo Beiwanglu (国资委与浙江省人民政府签署了合作备忘) [*The SASAC Signed a Cooperation Memorandum with the People's Government of Zhejiang*], SASAC, CHINA (Dec. 27, 2011), <http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/14179369.html>.

118. For instance, since 2013, the cooperation between central SOEs (e.g. China Minmetals Corporation, China Railway Materials Company Limited, Sinosteel Corporation, etc.) and Hebei Iron and Steel Group Company Limited (a provincial SOE) has enhanced the upstream-downstream cooperation in the steel industry in Hebei market and squeezed the living space of other local competitors. Furthermore, in Hubei Province, Wuhan Iron and Steel (Group) Corporation (a central SOE) has wholly owned Echeng Iron & Steel Co., Ltd. (a provincial SOE) from 2013 onward. *See, e.g.*, Wang Daojun, *Duijie Yangqi de Quanguo Chongdong* (从事与中央国有企业的合作) [*Being Engaged in the Cooperation with Central SOEs*] 3 SHANGHAI GUOZI [CAPITAL SHANGHAI, CHINA] 52 (2010); *see also* Chen Hongxia, *Hubeisheng Touzi Gongsi Tuichu, Wugang Jituan Quanpan Jieshou Egang* (国开发投资公司(湖北分公司)湖北分公司投资公司和武汉钢铁(集团)公司全资子公司鄂城钢铁有限公司) [*Wuhan Iron and Steel Group Took Over E-Hubei Hubei*], 21ST CENTURY BUS. HERALD (May 22, 2013); *see also* Lei Hanfa et al., *Hebei Gangtie Jituan yu Yangqi Zhanlve Hezuo Zaihuo Xinjinzhan* (河北钢铁集团有限公司与中央国有企业合作进入新阶段) [*The Cooperation between Hebei Iron and Steel Group Company Limited and Central SOEs Reaches a New Stage*], CHINA

However, the *Chinese Anti-Monopoly Law 2007* seems to contain no genuine sanctions or remedies to prevent this phenomenon happening.

2. Impregnable Administrative Powers – The Chinese Anti-Monopoly Law 2007 has a Long Way to Go

Unrestrained administrative intervention over almost all kinds of enterprise growth, and even the State's economic development, somehow exist in China. The phenomenon such as the SASAC's development plan on the cooperation among local governments, central SOEs and local SOEs, remains in force, and continues to have influence on the effectiveness of the *Chinese Anti-Monopoly Law 2007*. Since the *Anti-Monopoly Law 2007* has not imposed genuine sanctions against administrative agencies that provide the inappropriate intervention to the market, it has become one of the worst and saddest realities that this Law has to face.

According to Article 51(1) of the *Chinese Anti-Monopoly Law 2007*, there are two "punishment" methods for administrative agencies and their officers where either plays a part in abusing administrative power to restrict competition in the market.¹¹⁹ The first is that the superior authority¹²⁰ shall order the lower-level authorities that issue excessive

ECON. NET (May 23, 2013, 3:31 PM), http://district.ce.cn/zg/201305/23/t20130523_24413113.shtml.

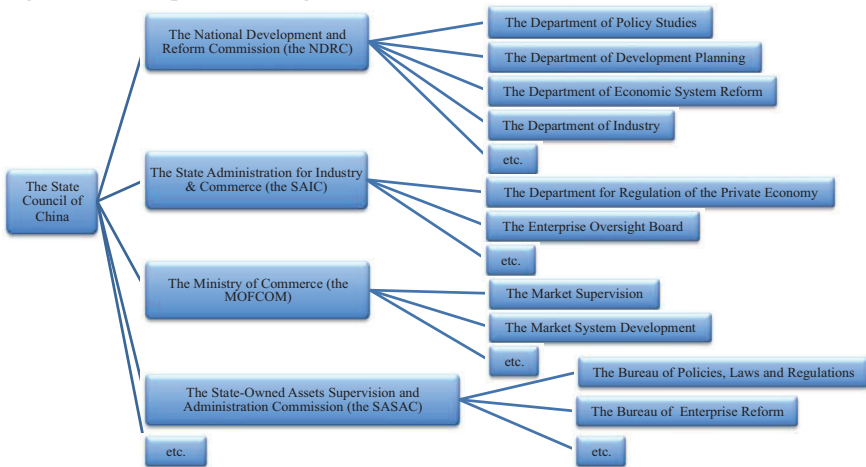
119. [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) STANDING COMM. NAT'L PEOPLE'S CONG., art. 51 (China).

120. The superior authorities, which issue excessive administrative directives, are the heads of those lower-level authorities (see figure 8 below):

administrative directives to make correction of their illegal behavior.¹²¹ The second is that the “superior authority shall impose punishments on the directly liable person(s)-in-charge and other directly liable persons”¹²² However, without specific penalties, these two methods cannot effectively crack down on either administrative agencies or the directly liable person. Therefore, the two methods of punishment of administrative authorities and officers cannot ensure the smooth implementation of the *Chinese Anti-Monopoly Law 2007*.¹²³

There is a further problem. Article 51(1) mentions that “[t]he anti-monopoly authority may put forward suggestions on handling [of cases] according to law to the relevant superior authority.”¹²⁴ Administrative

Figure 8: A Sample of the Organizational Structure of the State Council of China



See *State Council Organization Chart*, STATE COUNCIL OF CHINA (Aug. 28, 2014, 1:17 PM), http://english.gov.cn/state_council/2014/09/03/content_281474985533579.htm (figure devised by the author).

121. See Stefan Weishaar, *Administrative Monopolies, State Aid, Barriers to Entry and Market Integration: Challenges for the Chinese Anti-Monopoly Law*, in *COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US AND EUROPE* 98, 120 (Michael Faure & Xinzhu Zhang eds., 2011).

122. [The Anti-Monopoly Law of China 2007].

123. *The Present Situation and Development of Chinese Competition Law and Policy and Practice*, in *Competition Policy and Law Commission of China Society for World Trade Organization Studies* 173 (2010).

124. [The Anti-Monopoly Law of China 2007] art. 51.

agencies have frequently used *appropriate*¹²⁵ or *inappropriate*¹²⁶ interventions in the market. However, it is rarely heard that any superior authority carries out supervision and inspection of the lower-level authorities¹²⁷ when such violations have occurred.¹²⁸

In order to solve this problem, the first judicial interpretation of the *Chinese Anti-Monopoly Law 2007* ('Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases arising from Monopolistic Conducts' [2012]) was came into force on June 1, 2012. This judicial interpretation clearly expressed the view that, in China, *natural persons*, *legal persons*, and *other organizations* could bring a civil action against those who issue inappropriate administrative directives that adversely affect their growth.¹²⁹ According to Article 9 of

125. The author assumes that *appropriate interventions* mean that Chinese administrative agencies use their powers effectively to enhance competition and ensure sound and sustainable economic development.

126. The author assumes that *inappropriate interventions* in this article mean that Chinese administrative agencies abuse their powers to obstruct non-SOEs and interrupt competition in the market with a view to protecting SOEs and temporary State interest.

127. In 2014, the [Price Supervision and Anti-Monopoly Bureau] investigated the Hebei provincial government on its local protection conduct for the first time. *See* Song, *supra* note 53.

128. Article 30 of the *Law of China against Unfair Competition 1993* provides a similar right for superior authorities when their subordinate authorities abuse their administrative powers in the economy. However, although the SAIC investigated and prosecuted over 500 administrative monopoly cases under the *Law of China against Unfair Competition 1993* between 1995 and 2005, no inappropriate intervention had been corrected and no directly liable person had been punished. *See, e.g.,* WANG XIAOYE, JINGZHENGFA XUE [COMPETITION LAW] 393 (2007); *see also* Zhou Dongxu, *Wang Xiaoye: Xingzheng Longduan Anjian Weihe Hanjian [Why Administrative Monopoly Cases are Uncommon]*, CAIXIN ONLINE (Sept. 15, 2014), <http://m.opinion.caixin.com/pad/2014-09-15/100728745.html>; *see also* THE FAIR TRADING BUREAU OF THE SAIC AND CASS RESEARCH CENTRE OF INTERNATIONAL LAW, FANLONGDUAN DIANXING ANLI JI ZHONGGUO FANLONGDUAN ZHIFA DIAOCHA [SELECTED ANTI-MONOPOLY CASES AND INVESTIGATION AND ANALYSIS ON THE CHINESE ADMINISTRATIVE ANTI-MONOPOLY ENFORCEMENT] Introduction (2007); *see also* WANG, *supra* note 63, at 356–57; *see also* [The Law of China against Unfair Competition 1993] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 30, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm.

129. Zuigao Renmin Fayuan Guanyu Shenli yin Longduan Xingwei Yinfa de Minshi Jiufen Anjian Yingyong Falv Ruogan Wenti de Guiding <(最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定)> [Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases

this judicial interpretation,¹³⁰ the People's Court may assume dominant positions of the defendants in the relevant markets based on the specific market structure and competitive circumstance, unless there is sufficient evidence to invalidate such a finding.¹³¹ This Article grants much decision-making power to the People's Courts in China in a highly specialized area.¹³² However, the decision-making power has a double-sided nature. Without genuine use and necessary restriction, it may be hard to uphold the principle of fairness. Because the People's Courts cannot be regarded as an independent law enforcement agency,¹³³ some

Arising from Monopolistic Conducts] (promulgated by the Judicial Comm. of the Supreme People's Court, Jan. 30, 2012, effective June 1, 2012), http://www.court.gov.cn/qwfb/sfs/201205/t20120509_176785.htm; see also The Anti-Monopoly Law of China 2007, art. 50 ("Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.").

130. [Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conducts].

131. Under Article 9 of [Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases arising from Monopolistic Conducts], a *public utility* with a *statutory monopoly* can be directly defined as having a dominant market position in the absence of evidence to the contrary. Based on the policy of [The SAIC's Responding to How to Identify Other Operators Occupying Monopoly Status According to Law] (2000), *statutory monopoly* means that the operator is the only one, or exists with insufficient competition, in the relevant market. Therefore, if the Chinese fixed-broadband industry is examined, the SOEs' dominant position cannot be defined directly because China Telecom and Unicom are, on the surface, "effective competitors" created by the State. And relevant privately owned SMEs must provide evidence of their dominant positions for private anti-monopoly lawsuits. See, e.g., *id*; see also WANG, *supra* note 63, at 381–82; see also KONG XIANGJUN ET AL. EDS., FANBUZHENG DANG JINGZHENGFA: YUANLI, GUIZE, ANLI [THE CHINESE ANTI-UNFAIR COMPETITION LAW: PRINCIPLES, RULES & CASES] 134 (2006).

132. Ma Guangyuan, *Shekeyuan Zhuanjia: Minzhong Qisu Longduan Qiye Yiran Kunnan Chongchong* [The Academy of Social Sciences Experts: People to Prosecute the Monopoly is Still Difficult], CHINA BROADCASTING NETWORK (May 9, 2012), <http://www.antimonopolylaw.org/article/default.asp?id=3785>.

133. In the area of competition law, such a situation not only exists in China, but also appeared in the United States. Professor Grimes mentioned that "the court has failed on its role to carefully examine economic policy arguments because of the unprincipled way in which it mixes arguments based on *state desire* or precedent with economic analysis." Donald Clarke et al., *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 375 (Loren Brandt & Thomas G Rawski, 2008); see also Williams, *supra* note 66, at 96; see also Warren S. Grimes, *Fifteen Years of Supreme Court Antitrust Jurisprudence: The Defendant Always Wins*, in THE

anti-monopoly lawsuits involving large-scale SOEs, which implement inappropriate administrative interventions, may turn into administrative issues. Therefore, providing workable legal limitations for administrative agencies and SOEs which abuse their exclusive rights is difficult for the *Chinese Anti-Monopoly Law 2007* to achieve when the People's Courts can intervene. It remains difficult for privately owned SMEs to turn their situations from hopeless to hopeful when facing administrative interventions.

The fact that there are no genuine sanctions against those who issue inappropriate administrative directives to the market is another major legal flaw in the *Chinese Anti-Monopoly Law 2007*.¹³⁴ However, the Chinese administrative laws and regulations that ought to remedy this legal flaw do not seek to effectively confine or prohibit administrative agencies or their officers if they abuse their administrative power¹³⁵ and thereby restrict competition in the market.¹³⁶

In detail, there are two ways to look for protection from administrative laws and regulations in China: *administrative lawsuits* and *administrative reconsiderations*.¹³⁷ According to Article 13(1) of 'The

DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 30 (Roger Zäch et al. eds., 2010).

134. All Articles of the [Chinese Anti-Monopoly Law 2007], which relate to the abuse of administrative powers, are general principles of the prohibition without any specific sanctions. The approach of "the superior authority punishment and correction" (Article 51 of the [Chinese Anti-Monopoly Law 2007]) is ineffective and requires a strong support from the administrative laws and regulations. See YU LIANGCHUN, FAN XINGZHENGXING LONGDUAN YU CUJIN JINGZHENG ZHENGCE QIANYAN WENTI YANJIU [STUDY ON NEW RESEARCH FRONTIERS IN ANTI-ADMINISTRATIVE MONOPOLY AND COMPETITION POLICIES] 129–31 (2008).

135. GUAN BAOWING, HUANG HUI & CAO JIE, XINGZHENG LONGDUAN ZHI XINGZHENGFA GUIZHI [REGULATING ADMINISTRATIVE MONOPOLY TOWARD THE CHINESE ADMINISTRATIVE LAW] 98 (2008).

136. The *Law of China against Unfair Competition 1993* presented a similar situation. See *supra* note 128 and accompanying text.

137. In China, there are two types of administrative actions, "the specific administrative action" and "the abstract administrative action." "The specific administrative action," which can be challenged by *administrative lawsuits*, is a form of behavior with the aim of regulating specific people when they do specific things. "The abstract administrative action," which cannot be challenged by administrative lawsuits, is a form of behavior with the aim of formulating binding rules for non-specific people and things. For instance, "[t]he people's courts shall not accept actions initiated by citizens, legal persons or other organizations concerning any of the following matters:

Interpretation of the Supreme People's Court on Several Issues of Administrative Procedure Law of China' [2001], "the specific administrative action" relating to fair competition can be challenged.¹³⁸ However, the *Administrative Procedure Law of China 1989* does not offer suitable protection for the aggrieved party.¹³⁹ In the case of the SASAC's development plans on mergers of SOEs in the 2010s,¹⁴⁰ for

...Administrative rules and regulations, or decisions and orders with general binding force formulated and promulgated by administrative organs..." See, e.g., [The Administrative Procedure Law of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 12, http://www.china.org.cn/government/laws/2007-04/16/content_1207336.htm; see also [The Law of China on Administrative Reconsideration] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm.

Article 7: If citizens, legal persons or other organizations consider illegal the following provisions, which the administrative organs take as the basis for their specific administrative acts, they may also apply for examination of these provisions when applying for *administrative reconsideration* of the said acts:

- (1) provisions formulated by departments under the State Council;
- (2) provisions formulated by local people's governments at or above the county level and the department under them; and
- (3) provisions formulated by township or town people's governments.

The provisions listed in the preceding paragraph do not include rules and regulations formulated by the ministries and commissions under the State Council or by local people's governments. The examination of rules and regulations shall be carried out in accordance with laws and administrative regulations.

138. [The Interpretation of the Supreme People's Court on Several Issues of Administrative Procedure Law of China 2001] (promulgated by the Jud. Comm. of the Sup. People's Ct., Nov. 24, 1999, effective Mar. 10, 2000).

139. *The Present Situation and Development of Chinese Competition Law and Policy and Practice*, *supra* note 123, at 174.

140. The SASAC has launched a series of development plans on mergers of SOEs from 2010 onward to reduce the number of Chinese SOEs and enhance their comprehensive strength. See *supra* text accompanying note 95. Since 2014, SOE reform has been improved, and the introduction of private funds into SOEs is the basis of a new mixed-ownership reform in China. See, e.g., Lv Hongqiao, *Huoqi Hebing Chongzu Lidu*

privately owned market participants who may hope to protect themselves from these plans, the *Chinese Anti-Monopoly Law 2007* cannot safeguard their interests.¹⁴¹ Similarly, neither can Chinese administrative laws and regulations do anything useful because the cooperation between central SOEs and local governments or local SOEs, belonging to “the abstract administrative action,”¹⁴² cannot be challenged by administrative lawsuits.¹⁴³ Thus, administrative reconsideration becomes the only protection method for privately owned market participants. However, because bureaucrats traditionally tend to shield one another, the administrative reconsideration would be a long and fruitless road for privately owned SMEs.

As a result, since there is an absence of genuine sanctions to combat excessive administrative directives, the *Chinese Anti-Monopoly Law 2007* cannot prevent administrative agencies and SOEs from abusing their exclusive rights to interfere in the market. Victims of privately owned SMEs who suffer from the abuse of these rights have rarely attracted attention from the *Chinese Anti-Monopoly Law 2007*.¹⁴⁴ Even

Jingren, Huo Jianshao Liuqicheng [A Shocking Process in SOE Merger and Acquisition, The Total Number of Chinese SOEs May Decline by 60-70 Percent], CHINESE RADIO NETWORK (Jan. 6, 2015, 8:46 a.m.), http://finance.cnr.cn/txcj/20150106/t20150106_517319785.shtml.

141. The SASAC’s development plans to merge SOEs have been following administrative directives rather than [The Chinese Anti-Monopoly Law 2007]. The administrative enhancement of SOEs lowers competitiveness of privately owned market participants and thereby reduces their economic interests. Focusing on a recent action on mergers of SOEs, namely the new mixed-ownership reform plan, the Central Government of China may benefit from private funds, with the aim of improving SOEs. Liu Liliang, *Jin Shixiang Guoqi Gaige Fangan Youwang Shuaxian Chutai* [Nearly Ten SOE Reform Programs are Expected to Come into Force], ZHONGGUO ZHENGQUAN BAO [CHINA SECURITIES JOURNAL] (Jan. 28, 2015), <http://finance.sina.com.cn/china/20150128/011921412356.shtml>.

142. GUAN, *supra* note 135, at 9–10.

143. [The Administrative Procedure Law of China], (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 12, http://www.china.org.cn/government/laws/2007-04/16/content_1207336.htm; [The Law of China on Administrative Reconsideration] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 29, 1999, effective Oct. 1, 1999), art. 7, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm.

144. For example, the Hebei government aimed to merge and decrease both State-owned and privately owned steel enterprises located in the province, without considering market rules. In this process, all shutdown and merged steel enterprises can be described

worse, a source of possible external assistance, namely administrative laws and regulations, is unable to assist in restricting the administrative power. In summary, privately owned SMEs have been subjected to unfair treatment over a long period of time. Why does inappropriate administrative intervention continue to be a very stubborn phenomenon in China? Analysis of the legal flaws in the *Chinese Law on Promotion of SMEs 2002* and the *Chinese Anti-Monopoly Law 2007* may offer a partial answer, but not a complete answer. Alternatively, the inherent tension between the *Chinese Anti-Monopoly Law 2007* and the State's industrial policy may provide a useful explanation for the weak survival conditions of privately owned SMEs.

III. INHERENT TENSION BETWEEN THE *CHINESE ANTI-MONOPOLY LAW 2007* AND THE STATE'S INDUSTRIAL POLICY ON THE DEVELOPMENT OF PRIVATELY OWNED SMES

Starting in 1978, China enacted a considerable number of policies for SMEs' development.¹⁴⁵ However, a dedicated legal framework for SMEs has little more than ten years' history in China, starting with the *Chinese Law on Promotion of SMEs 2002*. The growth of SMEs, a desire to increase practical cooperation between the new legal framework for those SMEs and the States' industrial policy, and even the State economy remain tricky issues. Although the *Chinese Anti-Monopoly Law 2007* and

as victims suffering inappropriate administrative interventions. See, e.g., CAO ET AL., *supra* note 135; see also Chen Yanpeng, *Guojin Mintui Zhishang: Shuishi Zuihou de Shouhaizhe?* [Casualties of the State Advances while the Private Sector Retreats: Who Are the Last Victims], CHINA TIMES (Dec 25, 2009, 10:41 PM), <http://www.chinatimes.cc/article/9880.html>.

145. For example, "the Reform and Opening Up" Policy (1978) started a new era in China: moving the State's attention from class struggle-oriented to economic construction-oriented. The publication "Preliminary Views on Economic Reform" (1980) held that China's economy was based on public ownership and diversified other ownership structures. The "Grasp the Big, Release the Small" policy (1995) meant the State focused on a few large-scale SOEs that were concerned with the lifeline of the national economy and national security, while it released the rest of the SOEs, especially State-owned SMEs, pushed them into the market, and allowed bankruptcy and privatization. See, e.g., *30th Anniversary of China's Reform and Opening-Up: Third Plenary Session of 11th Central Committee of CPC Held in 1978*, PEOPLE'S DAILY ONLINE (Oct. 9, 2008), <http://en.people.cn/90002/95589/6512371.html>.

the State's industrial policy have similar functions and final objective,¹⁴⁶ in other words the "public interest," conflict between them remains. This tendency has not only undermined the authority of the *Chinese Anti-Monopoly Law 2007*, but has also granted privileges to SOEs and administrative agencies and threatened the growth of privately owned SMEs. Consequently, based on such a phenomenon, the following section of this article devotes considerable attention to the competition between the *Chinese Anti-Monopoly Law 2007* and industrial policies, from two aspects: first, because the *Chinese Anti-Monopoly Law 2007* and industrial policies rely on different approaches to realize the resources allocated and avoid market failure, conflicts between them exist; and second, the tension between the *Anti-Monopoly Law 2007* and the State's industrial policy¹⁴⁷ will be examined from the perspective of the definition and position of the "public interest" in both of them.¹⁴⁸

146. See, e.g., Joseph E. Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 35 (Edward J. Balleisen & Davia A. Moss eds., 2012) ("[I]n principle there are government interventions that would be welfare enhancing.").

147. See, e.g., COMPETITION AND THE STATE 2 (Thomas K. Cheng et al. eds., 2014) ("[C]ompetition authorities for the most part played only a minor role in the formulation of these policies.").

148. In recent years, "public interest" has become a popular phrase in China. It appears in various laws and regulations, such as the [Civil Law of China 1986], the [Contract Law of China 1999], the [Property Law of China 2007], the [Administrative Permission Law of China 2003], and so on. However, hitherto, "public interest" has not had a clear definition. Although the [Trust Law of China 2001] and the [Law of China on Donations for Public Welfare 1999] have outlined the scope of the "public interest," they are unable to provide a clear definition for this phrase in the [Chinese Anti-Monopoly Law 2007]. See, e.g., [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 7, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm (Article 7 Civil activities shall have respect for social ethics and shall not harm the public interest, undermine State economic plans or disrupt social economic order). See also [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 52, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm ("Article 52 A contract is invalid in any of the following circumstances: . . . (4) harm is done to social and public interests.").

A. Different Approaches to Realizing Resource Allocation and the Avoidance of Market Failure

In China, it is generally considered that the *Chinese Anti-Monopoly Law 2007* and the State's industrial policy have the same functions in the area of the State's economic development: they are both devoted to ensuring an efficient allocation of resources and the avoidance of market failure.¹⁴⁹ However, this does not mean that the *Chinese Anti-Monopoly Law 2007* and the State's industrial policy are sufficiently similar that conflict is avoided.¹⁵⁰ In order to enhance economic efficiency¹⁵¹ and avoid market failure, the *Chinese Anti-Monopoly Law 2007* relies on the market mechanisms, whereas industrial policy aims to achieve such functions by administrative intervention. Although different roads can lead to the same goals, in the process of achieving those goals conflict is inevitable.

1. Market Mechanisms – The Ideal Trump Card for the Chinese Anti-Monopoly Law 2007

Because China has not been a traditional market economy country since 1949, the State's demands have often determined to a large extent

149. See, e.g., Qi Hongli, *Guojia Jingji Anquan yu Chanye Zhengce Lifa: Jiaru WTO gei Zhongguo Chanye Dailai de Chongji yu Riben Jingyan de Qishi* [The National Economic Safety and Industrial Legislation: Challenges after China's Accession to the WTO, with Special Reference to Japanese Experience], 19 YUNNAN FIN. & ECON. U. J. ECON. & MGMT., CHINA 123 (2003); see also Meng Yanbei, *Chanye Zhengce yu Fanlongduanfa de Chongtu yu Xietiao* [The Conflict and the Coordination between the Chinese Anti-Monopoly Law and the State's Industrial Policy], 2 SOC. SCI. R., CHINA 78 (2005); see also Liu Guiqing, FANLONGDUANFA ZHONG DE CHANYE ZHENGCE YU JINGZHENG ZHENGCE [THE RELATION BETWEEN COMPETITION POLICY AND INDUSTRIAL POLICY IN ANTITRUST LAW] 2 (2010).

150. Yong Huang & Shan Jiang, *Thirty Years of PRC Anti-Monopoly Law under "State-Market" Yardstick: From Retrospective and Prospective Viewpoints*, in THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 177 (Roger Zäch et al. eds., 2010).

151. Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L.J. 133, 142 (2008) (maintaining that allocative efficiency and productive efficiency are two elements of economic efficiency in the *Chinese Anti-Monopoly Law*).

the impact of economic development one way or another.¹⁵² Therefore, in China, a brief review of the history of the *Anti-Monopoly Law*'s development shows that it is synchronous with the gradual acceptance of the market mechanism by the State. Two years after the "Reform and Opening Up" Policy (1978), the State Council released the first competition policy ("the Interim Provisions on Carrying Out and Protecting Socialist Competition") in 1980.¹⁵³ From then on, market mechanisms have started to be gradually introduced to China. Since the end of the 1980s and the start of the 1990s, in order to keep pace with Chinese "deepening reform,"¹⁵⁴ the State has progressively acknowledged that market mechanisms, especially competitive mechanisms, should play an active role in the State's industrial and economic development.¹⁵⁵ In 1993, the *Law of China against Unfair Competition 1993* and 'the Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises' (1993),¹⁵⁶ which focused on fair competition and specific administrative rights in the market, came into effect. Afterwards, the development of competition law and policy finally ushered in the *Chinese Anti-Monopoly Law* in 2007.

152. CHINA'S DEEP REFORM: DOMESTIC POLITICS IN TRANSITION 239 (Dittmer & Liu eds.) (2006).

153. Guowuyuan Guanyu Kaizhan he Baohu Shehui Zhuyi Jingzheng de Zanxing Guiding [The Interim Provisions on Carrying Out and Protecting Socialist Competition] (promulgated by St. Council, Oct. 17, 1980, expired Oct. 6, 2001), <http://www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf>.

154. Deng Xiaoping, *We Should Maintain Moderately Rapid Growth of Production*, in SELECTED WORKS OF DENG XIAOPING VOL. III: 1982-1992 (1994) (maintaining that "China is deepening its reform, trying to create more favourable conditions for future development").

155. Li Peng, 1992 *Zhengfu Gongzuo Baogao* [1992 Government Work Report], HISTORY OF CHINA (Mar. 20, 1992), http://www.hprc.org.cn/wxzl/wxysl/lczf/dishiyijie_4/200908/t20090818_27702.html.

156. The SAIC launched The Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises (1993) to prohibit Chinese public enterprises (e.g. enterprises providing postal services, telecommunication services, transportation services, water supply, electricity supply, etc.) from abusing their market power to interrupt competition and reduce consumer welfare. Guanyu Jinzhi Gongyong Qiye Xianzhi Jingzheng Xingwei de Ruogan Guiding [The Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises] (1993) (promulgated by the SAIC, Dec. 24, 1993, effective Dec. 24, 1993), http://gkml.saic.gov.cn/auto3743/auto3746/200807/t20080729_112475.htm.

In the progression and development of the Chinese economy, State intervention has been widely used. Nowadays, in the context of State intervention, both the *Chinese Anti-Monopoly Law 2007* and the State's industrial policy are most useful and common tools for maintaining competition in the market. The most important distinction between them is that the *Chinese Anti-Monopoly Law 2007* is the core rule,¹⁵⁷ while the State's industrial policies are regional or temporary policies for specific purposes.

As the most basic rule for encouraging and protecting fair competition in the market, the *Chinese Anti-Monopoly Law 2007* not only needs to use market mechanisms, especially competition mechanisms to ensure the vitality of the market, but also has to prevent the disadvantages of market competition.¹⁵⁸ Because competition within the market among competitors is an individual behavior, nearly every competitor is concerned with its unique "self-interest,"¹⁵⁹ and proposes to maximize it without limitations.¹⁶⁰ Hence, without necessary restrictions, some market competitors probably gain strength at the expense of others. Even so, it is generally assumed that in the market, "[t]he promotion and protection of competition is a rule of thumb for maximizing welfare."¹⁶¹ Accordingly, as the source of the market vitality, market mechanisms also should be the trump card for the *Chinese Anti-Monopoly Law 2007*. Due to the advantages and disadvantages of market mechanisms, the *Chinese Anti-Monopoly Law 2007* adopts the fair use of it, which seems

157. HARRIS ET AL., *supra* note 66, at Foreword.

158. Organisation for Economic Co-operation and Development (OECD), *Competition Policy and Efficiency Claims in Horizontal Agreements* (OCDE/GD(96)65 (1996) (pointing out that "[t]here is general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies").

159. Adam Smith presumed that "self-interest" drove individual competitors to persuade customers on grounds of quality and value to make a particular purchase. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

160. Sonya Margaret Willimsy, *The Concept of Competition*, 18 EUR. COMPETITION L. REV. 54, 54 (1997) (maintaining that "[c]ompetition is the principal regulator of commercial forces . . . individual competitors' motivating force derives from the pursuit of self-interest").

161. Timo Vätilä, *No Policy is an Island – On the Interaction Between Industrial and Other Policies*, in *AN INDUSTRIAL POLICY FOR EUROPE?: FROM CONCEPTS TO ACTION* 8, 19 (Armin Riess ed., 2006).

to be the most important, popular and common alternative method of enhancing economic efficiency and avoiding market failure.

2. State-Oriented Industrial Policy in China

By contrast, as regards the lifeline of the national economy and national security, market mechanisms may not be sufficient to improve the global competitiveness of Chinese enterprises over a limited period of time. Instead, large-scale merger and reorganization seems to be a rapid and effective method for SOEs in several traditional State-owned industries (such as the steel industry, the petroleum industry, and so on).¹⁶² Hence, for the growth of the Chinese economy, the State-oriented industrial policy cannot be discarded. However, based on the State's industrial policy, the development approach adds too many of the State's desires to control the growth approach of SOEs and privately owned SMEs. In other words, in the area of Chinese industrial policy, efficient allocation of resources, and avoiding the prospect of market failure, can both be achieved by the actions of the State. However, the State cannot always be correct in intervening in the market: smooth economic development requires that the State industrial policy should be limited, and become a much more moderate method of driving Chinese economic growth. Otherwise, optimizing the allocation of resources could not be achieved, and the market failure may turn into government failure.¹⁶³

For instance, in order to transform China's steel industry into a large-scale industry, the State Council enacted the 'Steel Industry Revitalization Plan' in 2009, which considered that economic efficiency is absolutely related to the industrial scale.¹⁶⁴ Therefore, with the intention of enhancing the global competitiveness of steel SOEs, "big is

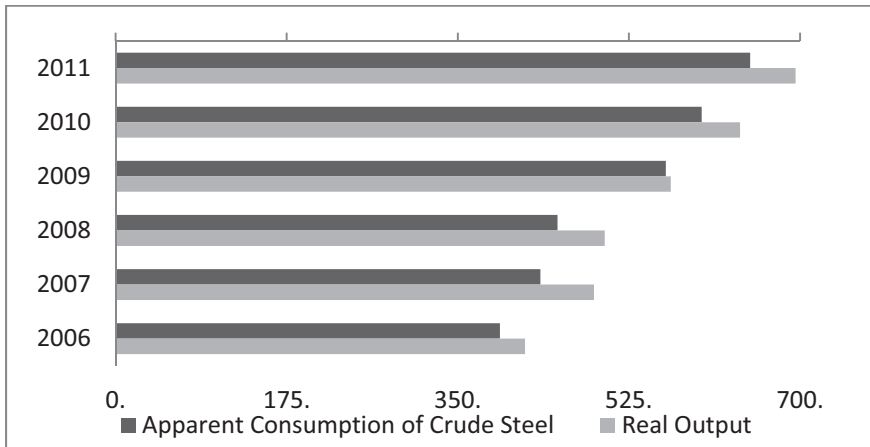
162. CHIEN-HSUN CHEN & HUI-TZU SHIH, *MERGERS AND ACQUISITIONS IN CHINA: IMPACTS OF WTO ACCESSION* 38–42 (2008).

163. State intervention is a commonly-used model for countries all over the world to avoid market failure. However, the fact is that, in the market, the shortcomings of governments are no less than those of markets. CHARLES WOLF, JR., *MARKET OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* 12–33 (2d ed. 1993).

164. See, e.g., [Steel Industry Revitalization Plan of China]; see also Guowuyuan Bangongting Guanyu Jingyibu Jiada Jieneng Jianpai Lidu Jiakuai Gangtie Gongye Jiegou Tiaozheng de Ruogan Yijian [Several Statements of the State Council on Further Structure Adjustment of Steel Industry] (promulgated by the St. Council, June 4, 2010, effective June 4, 2010), http://www.gov.cn/zwgc/2010-06/17/content_1629386.htm.

beautiful” has become a common dogma in the steel industry. However, size does not equate to strength. Concerning the rational input and output and reasonable scale of this industry over-production of basic and similar steel products already exceeded demand in China (see Figure 9 below). After the ‘Steel Industry Revitalization Plan’ (2009) was adopted, the tendency toward an excess of production over consumption appeared in the area of high-end steel products.¹⁶⁵ As a result, the government-oriented plan went against the aims of achieving an efficient allocation of resources and avoiding market failure, and engendered a worse situation of surplus production in the steel industry.

Figure 9: Chinese Crude Steel Statistics in Million Tonnes 2006–2011¹⁶⁶



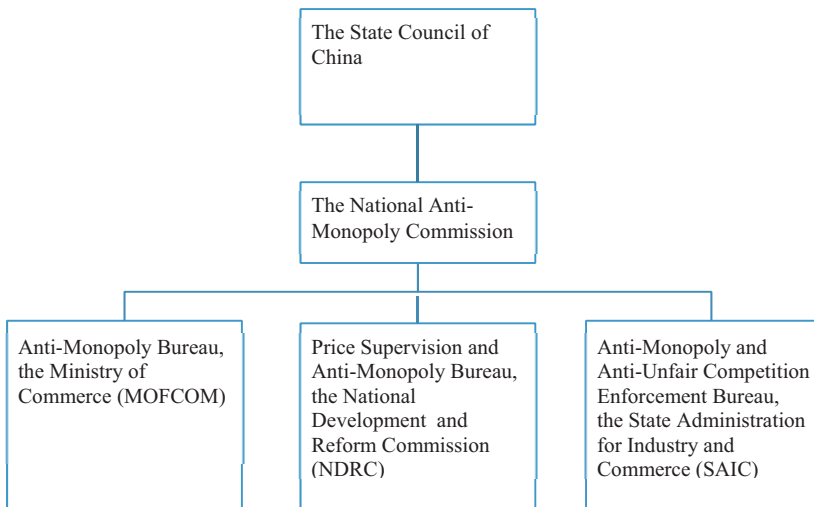
However, this is not the most unwelcome outcome that was brought about by the administrative intervention. The intervention also challenges the position of market mechanisms and the authority of the

165. Dong Wei, *Li Rongrong: Guoqi Gaige Bunengzou Huitoulu* [Li Rongrong: SOEs Reform Cannot Turn Back], CHINA YOUTH DAILY 1, 10 (2013).

166. See, e.g., Nat'l Dev. and Reform Comm'n, *2006 nian Shijie Cugang Chanliang Dadao 12 yidun* [2006 World Crude Steel Production Reached 1,200 Million Tonnes], NDRC, CHINA (Feb. 7, 2007, 2:59 PM), http://www.ce.cn/cysc/main/jtfzspssy/shwl/200702/07/t20070207_10351012.shtml; see also *World Crude Steel Output Increases by 7.5% in 2007*, INT'L IRON & STEEL INST. (IISI) (Jan. 23, 2008), <http://www.worldsteel.org/media-centre/press-releases/2008/2007-world-steel-output.html> (figured devised by author).

Chinese Anti-Monopoly Law 2007. The “Steel Industry Revitalization Plan” (2009) allowed every provincial government to make its own merger plan for local steel enterprises.¹⁶⁷ The only *controlling procedure* to examine those plans was to submit them to the relevant State agency before putting it into practice. However, because the relevant State agency simply needs to know what the plan is, rather than examine whether it is in conformity with the *Chinese Anti-Monopoly Law 2007*, this *controlling procedure* has no practical significance. To make matters even worse, there is no independent anti-monopoly enforcement agency in China that is dedicated to enforcing the *Anti-Monopoly Law 2007* (see Figure 10 below) toward those administrative merger plans. Therefore, the voice of media criticism¹⁶⁸ called those mergers that totally ignore the *Chinese Anti-Monopoly Law 2007 Administrative Mergers*.

Figure 10: Structure of Chinese Current Anti-Monopoly Enforcement Agencies at Present¹⁶⁹



167. [Steel Industry Revitalization Plan of China].

168. See, e.g., He, *supra* note 41.

169. See, e.g., WEN XUEGUO ET AL. EDS., FANLONGDUANFA ZHIXING ZHIDU YANJIU [RESEARCH ON ANTI-MONOPOLY LAW ENFORCEMENT SYSTEM] 67 (2011) (figured devised by author); see also HARRIS ET AL., *supra* note 66, at 263.

Hence, apart from the same functions and a similar final objective, there are conflicts between the *Chinese Anti-Monopoly Law 2007* and the industrial policy, which are caused by the State's particular stage of development. If the State treats the *Chinese Anti-Monopoly Law 2007* as a priority, this would be good for market mechanisms, especially the competitive mechanism.¹⁷⁰ However, because of a lack of international competitiveness, the national economy would sooner or later be harmed. If the State treated the industrial policy as a priority, China's international competitiveness would be assured and enhanced in the short term. Nevertheless, this decision would indulge the State intervention in the area of Chinese economic development and lead to the existing situation of administrative monopolies going from bad to worse.¹⁷¹

Thus, at present, the actual conflicts between the *Chinese Anti-Monopoly Law 2007* and the State's industrial policy generate the following two questions: (1) What is the most suitable mix of conditions needed to treat the conflicts between them and to make them work together harmoniously? (2) What is the most suitable mix of conditions needed to create effective cooperation between the imperfect market and the imperfect government in the process of Chinese economic development? The "public interest," the reconciliation between the State's interest, the interests of enterprises and consumer welfare, might be the ultimate standard for the solution of these two questions.

170. Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L.J. 671, 697 (2014).

171. Concerning steel merger plans in Hebei province, although the previous plans (from 2005 to 2013) concluded that some privately owned steel SMEs disappeared illegally and merged steel enterprises operated independently, the Hebei provincial government could not allow the *administrative merger* to fail. Instead, the publication Hebei Structural Adjustment Program on the Steel Industry came into force in 2014 to further reduce the number of local privately owned steel enterprises. See, e.g., Gao Pengfei, *Hebeisheng Gangtie Qiye Lianhe Chongzu Moshi Fenxi* [Analysis on the Restructuring Mode of Steel Enterprises in Hebei Province], 10 CHINA STEEL 14, 17 (2011); see also Yuan Zhiguang, *Hebei Gangtie Chanye Jiegou Tiaozheng Zaichu Zuhequan* [Further Restructuring in the Hebei Steel Industry], XINHUA, CHINA (Dec. 6, 2014, 4:00 PM), http://www.chinadaily.com.cn/hqj/xfly/2014-12-06/content_12849807.html.

B. The “Public Interest” in China: Exclusion or Compromise

Article 1 of the *Chinese Anti-Monopoly Law 2007* insists that safeguarding the “public interest” is one of the major objectives of this law.¹⁷² Some scholars maintain that the State’s industrial policy has a similar final objective: the “public interest.”¹⁷³ However, there is no consensus on the meaning of “public interest” in China.¹⁷⁴ Whether the “public interest” should be excluded by other elements, such as consumer welfare and the State’s interest, remains a problem.¹⁷⁵ Specifically, there is a common voice that, in the *Chinese Anti-Monopoly Law 2007*, the “public interest” is equivalent to consumer welfare.¹⁷⁶ On the other hand, the State’s industrial policy always treats the State’s interest as a matter of priority and insists it could represent the majority of the “public interest” in the market.¹⁷⁷

172. [The Anti-Monopoly Law of the People’s Republic of China].

173. See, e.g., Qi, *supra* note 149, at 123; see also Wang Xiaoye, *Fanlongduanfa Zhongde Shehui Gonggong Liyi* [The Public Interests in the Chinese Anti-Monopoly Law], CHINESE ACAD. OF SOC. SCI. REV. (2008), available at <http://theory.people.com.cn/GB/49150/49153/7377262.html> (last visited Mar. 7, 2015); see also Stiglitz, *supra* note 146, at 12.

174. Jiang Wuzhen, *Fanlongduanfa Zhong de Gonggong Liyi Jiqi Shixian* [The Public Interest in Chinese Anti-Monopoly Law and its Implementation], 4 PEKING U. L.J. 551, 553 (2010).

175. Xiaoye Wang, *Challenges in Enforcing Chinese Antimonopoly Law*, CHINESE ACAD. SOC. SCI. (Feb. 16, 2015), <http://www.iolaw.org.cn/showarticle.asp?id=2242>.

176. Interview with famous Chinese scholar on Chinese Anti-Monopoly Law (the scholar did not allow the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed), in China (2012); see also Interview with a leading academic expert the Chinese Anti-Monopoly Law (the scholar did not agree the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed), in China (2012) (the expert pointed out that the “public interest” is not the only goal in the Chinese Anti-Monopoly Law 2007. It is vital to emphasize the importance of “consumers welfare”); see also Wuzhen, *supra* note 174, at 557 (pointing out that because “consumer welfare” concerns all consumers involved in different anti-monopoly cases, comprehension of this term varies from case to case. That is why “consumer welfare” could be used to explain the “public interest” in the [Chinese Anti-Monopoly Law 2007]).

177. See, e.g., Zhang Shouwen, *Lun Jingjifa de Xiandaixing* [Study on the Modernity of Economic Law], in JINGJIFA LUNWEN XUANCUI [SELECTED PAPERS ON ECONOMIC LAW] (2004); see also Qi, *supra* note 149, at 123; see also Xiao Shunbin, *Woguo Xueshujie Guanyu Gonggong Liyi de Zhuyao Guandian ji Pingjia* [On the Main

Competition between consumer welfare and the State's interest leads to a weird situation in China whereby "public interest," which loses its function of keeping a balance on interests in the market, is not the same one in different areas. The difference between "consumer welfare," "the State's interest," and "the public interest," is a very necessary one. In fact, the "public interest," which is wider than mere consumer welfare or the State's interest, can be used to provide consumers with better-quality goods and services, and place enterprises in a better position to compete both in the nation and worldwide. Where there is competition between consumer welfare and national interest, which relates to the development of SOEs and non-SOEs, the State should adopt a neutral position.¹⁷⁸

*1. Consumer Welfare or the "Public Interest" – A
Perspective of the Chinese Anti-Monopoly Law 2007*

A significant point in competition law is that "antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of the law – what are its goals?"¹⁷⁹ This statement also holds true when one is examining the *Chinese Anti-Monopoly Law 2007*. Whilst consumer welfare and the "public interest" both play important roles in the objectives of this Law, a question still arises: what is the genuine relationship between them?¹⁸⁰ To this day, whether consumer welfare could be considered as the "public interest" in the *Anti-Monopoly Law 2007* is still a conundrum.

On the one hand, hitherto, many global mainstream competition laws have been more inclined to protect consumer welfare as a matter of top priority.¹⁸¹ It has been fashionable to use consumer welfare to explain the

Points of Public Interest in Chinese Academic Circles], 6 J. YUNNAN UNIVERSITY (LAW EDITION), CHINA 30 (2009).

178. See generally MARK FURSE, *ANTITRUST LAW IN CHINA, KOREA AND VIETNAM* 69 (2009).

179. ROBERT H. BORK, *ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50 (1978).

180. SONJA E. KESKE, *GROUP LITIGATION IN EUROPEAN COMPETITION LAW: A LAW AND ECONOMIC PERSPECTIVE* 9-13 (2010) (pointing out that whether consumer welfare could be considered as the "public interest" or not also provoked debate in EU competition law).

181. See, e.g., WORLD BANK, *A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY* 9 (1998) (maintaining that

“public interest” in many countries.¹⁸² On the other hand, there exists a paradox¹⁸³ – competition law aims to maximize “the overall wealth of

“competition law and policy should assign the greatest importance to fostering economic efficiency and consumer welfare”); *see also* Eleanor M. Fox, *Rapporteur of Session Two*, in *EUROPEAN COMPETITION LAW ANNUAL 1997: OBJECTIVES OF COMPETITION POLICY* 157 (Claus-Dieter Ehlermann & Laraine L. Laudati eds., 1998); *see also* Canada Competition Act, R.S.C. 1985, c C-34, § 1.1.

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

See also Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, C-54 § 1.

Article 1 The purpose of this Act is, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, etc., and all other unjust restriction on business activities through combinations, agreements, etc., to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.

182. Wuzhen, *supra* note 174, at 557.

183. *See, e.g.*, Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987) (pointing out that “[t]he term consumer welfare is the most abused term in modern antitrust analysis”); *see also* EUROPEAN COMPETITION LAW ANNUAL 1997: OBJECTIVES OF COMPETITION POLICY 13 (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1998) (maintaining that “consumer welfare should not be the central or even exclusive goal of antitrust, or that antitrust should be concerned about unemployment, inflation or other macroeconomic issues”); *see also* Rex Ahdar, *Consumers, Redistribution of Income and the Purpose of Competition Law*, 7 EUR. COMPETITION L. REV. 341, 347–48 (2002) (pointing out that “[l]et us return to the Chicagoan definition of consumer welfare as total welfare (or allocative efficiency). This is plainly wrong . . .”); *see also* Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 COLUM. J. EUR. L. 289, 303 (2000) (pointing out that however “[i]n practice there are a number of

society.”¹⁸⁴ In the case of EU Competition Law, there are two ambivalent statements on the ultimate objective. One statement is that competition law protects consumer welfare rather than the whole “public interest.”¹⁸⁵ The other statement is the complete opposite, maintaining that its objective should be something much more important than consumer welfare.¹⁸⁶ Consumer welfare, which is advocated by EU Competition Law, may not fully represent the concept of “fair” completely in the market and society.¹⁸⁷ However, as a sort of complex interest, the “public interest” is able to balance the interests of enterprises, industries, employees, consumers, governments, and so on. To put it another way, from the perspective of competition law in some countries and regions, there may be a need to reduce the consumer welfare on some occasions in order to ensure the “public interest” at the jurisdictional stage.¹⁸⁸

This paradox appears in the *Chinese Anti-Monopoly Law 2007* as well. Although the argument that the “public interest” is similar to consumer welfare is prevalent in China,¹⁸⁹ the State’s actions taken in

different economic, social and political objectives which may form part of any particular competition policy”).

184. See, e.g., Giorgio Monti, *EC Competition Law: The Dominance of Economic Analysis?*, in *THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES* 6 (Roger Zäch et al. eds., 2010); see also *HANDBOOK OF ANTITRUST ECONOMICS* xiv (Paolo Buccirossi ed., 2008).

185. Philip Lowe, *Preserving and Promoting Competition: A European Response*, 2 *COMPETITION POL’Y NEWSL.* 1, 1 (2006) (pointing out that “[c]ompetition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare”).

186. K. J. Cseres, *The Controversies of the Consumer Welfare Standard*, 3 *COMP. L. REV.* 121, 124, 172 (2007). (“Competition law is primarily concerned with economic efficiency and with the overall welfare of society, without distinguishing between different groups of society . . . Competition policy also has other goals than improving final consumers’ welfare and therefore final consumers cannot and should not become the sole focus of competition laws.”).

187. Roger Zäch & Adrian Künzler, *Freedom to Compete or Consumer Welfare: The Goal of Competition Law According to Constitutional Law*, in *THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES* 61, 71 (Roger Zäch et al. eds., 2010).

188. TOWNLEY, *supra* note 77, at 90.

189. See, e.g., Interview, *supra* note 176; see also Zhan Hao, ZHONGGUO FANLONGDUAN MINSHI SUSONG REDIAN XIANGJIE: ‘GUANYU SHENLI YIN LONGDUAN XINGWEI YINFA DE MINSHI JIUFEN ANJIAN YINGYONG FALV RUOGAN WENTI DE GUIDING [THE HOT ISSUES OF CHINA ANTI-TRUST PRIVATE LITIGATION: THE JURIDICAL

pursuit of consumer welfare can often conflict with and indeed negate the “public interest.”¹⁹⁰ As regards the reform process of the Chinese telecommunications industry, the fundamental purpose is to serve consumers better than before. However, in reality, the State helped China Telecom and Unicom (two SOEs) form a duopoly model in the domestic telecommunications market.¹⁹¹ Contrary to fair competition and consumer welfare, the telecommunications SOEs used their dominant position as an excuse for market segmentation. Since consumers do not have adequate rights to select suitable service providers and services,¹⁹² consumer welfare in the telecommunications industry is unable to be guaranteed. In addition, telecommunications SOEs, which control China’s broadband source, can refuse transactions with other potential competitors.¹⁹³ This not only poses a dilemma to potential private enterprises seeking to enter the market, but also creates negative effects on fair competition. Thus, with the disappearance of consumer welfare and fair competition, the “public interest” that attempts to balance

INTERPRETATION ISSUED BY CHINA SUPREME COURT AND THE ANALYSIS OF ANTI-TRUST CASES] 63 (2012).

190. Neil W. Averitt, *Protecting Consumer Choice: Competition and Consumer Protection Law Together*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 36, 37–39 (Josef Drexler et al. eds. 2011) (maintaining that maximizing consumer protection, a unilateral behavior in the market “is directed against any form or seller conduct”).

191. In the second half of 1992, in order to establish *China Unicom* (a telecommunications SOE), the former Ministry of Electronics Industry, the Ministry of Electric Power Industry and the Ministry of Railways unveiled their joint proposal to the State Council. This proposal highlighted the importance of introducing competition into the telecommunications markets, as well as mentioning the fact that this market had serious contradictions: *China Telecom* (another telecommunications SOE) monopolized the market and the market supply was unable to meet the demand. Subsequently, *China Unicom* was established in 1994. However, contrary to the original intentions of the proposal, *China Telecom* and *Unicom* created a duopoly model in the domestic telecommunications market. Yuan Chunhui, GUANZHI ZHILI: ZHONGGUO DIANXIN CHANYE GAIGE SHIZHENG YANJIU [REGULATORY GOVERNANCE: EMPIRICAL STUDY OF CHINA’S TELECOMMUNICATIONS INDUSTRY REFORM] 132–33 (2009).

192. Interview with a staff of China Telecommunications Corporation (*China Telecom*) (the officer did not agree the researcher to use his name in any written work arising from the study, but did consent to being interviewed) in China (2012).

193. See, e.g., *id.*; see also Wang Xiangjun, DIANXINYE ZHENGFU JIANGUAN YANJIU: XINGZHENGFA SHIJIAO [GOVERNMENT REGULATION OF THE TELECOMMUNICATIONS INDUSTRY: THE ADMINISTRATIVE LAW PERSPECTIVE] 127 (2009).

different kinds of interests in the Chinese economic growth approach is unable to realize.¹⁹⁴

Therefore, in the *Chinese Anti-Monopoly Law 2007*, using “consumer welfare” to replace the “public interest” is not a wise choice,¹⁹⁵ because the State may take on increasing responsibilities and intervene in the market in the name of consumer welfare. Accordingly, in this process, aside from the State’s short-term interest, other interests in the market are unable to be appropriately considered. Action taken by the State, ostensibly in the pursuit of consumer welfare, may place the “public interest” in jeopardy. Alternatively, if consumer welfare is maximized, the interests of competitors may be reduced. These competitors, the fountainhead of any market’s vitality, will then lose their motivation to compete. Such a situation would be a disaster for the market and the *Chinese Anti-Monopoly Law 2007*. Hence, in line with the EU approach, choosing the “public interest” as the final aim of the *Chinese Anti-Monopoly Law 2007* is undoubtedly the most sensible way.¹⁹⁶ Simultaneously, treating consumer welfare as an important aspect of realizing the “public interest” may be a better choice for China. Other kinds of interests, such as the State’s interest, the interests of competitors, consumer welfare, and so on, could thereby be protected in the same fashion.

2. The State Interest or “Public Interest” – A Perspective of the Chinese Industrial Policy

According to a European source, although there is a consensus that industrial policy in the market pursues the “public interest” in some way, as regards a definition of the “public interest,” the industrial policy

194. See *Anti-Monopoly Probe into Telecom Giants Confirmed*, CHINA DAILY (Nov. 9, 2011, 3:28 p.m.), http://www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm.

195. Wang Xiaoye, *Woguo Fanlongduan Lifa de Zongzhi [The Purpose of Antitrust Legislation in China]*, 2 J. EAST CHINA U. OF POL. SCI. & L. 98 (2008).

196. See, e.g., Pieter Kalbfleisch, *Aiming for Alliance: Competition Law and Consumer Welfare*, 2 J. EUR. COMP. L. & PRAC. 108, 113 (2011); see also Peter A.G. van Bergeijk & Erik Kloosterhuis, *How to Merge with Law and Economics?*, in *MODELLING EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES 1* (Peter A.G. van Bergeijk & Erik Kloosterhuis eds., 2005).

proposes that it could correspond to the State's interest.¹⁹⁷ However, similar to the role of consumer welfare in the field of the *Chinese Anti-Monopoly Law 2007*, the State's interest, which is only one element in the wider goal of realizing the "public interest," cannot achieve the "public interest"¹⁹⁸ if it is pursued to the exclusion of consumer welfare and fair competition between market participants.¹⁹⁹ On some occasions, for the sake of ensuring the State's economic security and global competitiveness, the State's interest may refuse to measure allocative efficiency and consumer welfare for a while.²⁰⁰ Also, because redistribution of wealth might be a political issue, from the perspective of the State's industrial policy,²⁰¹ the State may be primarily concerned to pursue national/international strategic economic development objectives, fully consistent with the State's demands of national development, rather than fair competition for individual participants.²⁰² Nonetheless, as

197. Johan den Hertog, *Economic Theories of Regulation*, in REGULATIONS AND ECONOMICS 25 (Roger J. Van den Bergh & Alessio M. Paccas eds., 2nd ed. 2012).

198. See, e.g., Ekaterina Rousseva, RETHINKING EXCLUSIONARY ABUSES IN EU COMPETITION LAW 12 (2010). See also David J. Gerber, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 127 (2001) (pointing out that exclusionary abuses, granted by regulations, can harm the "public interest").

199. Harry M. Trebing, *Government Regulation and Modern Capitalism*, 3 J. ECON. ISSUES 87, 92 (1969) ("Administrative agencies are ad hoc responses to specific economic problems and political pressures, seldom capable of policy formulation for adequate delineation of public interest objectives.").

200. See Philip Lowe, *The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition*, 3 COMPETITION POL'Y NEWSL. 1, 6 (2008).

201. See, e.g., Kalbfleisch, *supra* note 196; See also Pieter Kalbfleisch, *The Assessment of Interests in Competition Law: A Balancing Act*, in ECONOMIC LAW AND JUSTICE IN TIMES OF GLOBALISATION: FESTSCHRIFT FOR CARL BAUDENBACHER 455, 473 (Mario Monti ed., 2007).

202. In 2013, a typically positive change was launched in the Chinese fixed-broadband sector: China decided to open up the fixed-broadband market for private funds. This move could improve the usage of fixed broadband, as well as boosting market competition throughout the country. However, without "network interoperability" in the fixed-broadband sector, private operators are unable to enter the market as easily as they expected. Thus, the poor situation of consumers in the fixed-broadband market remains. See, e.g., Kuandai Zhongguo Zhanlv ji Shishi Fangan ["Broadband China" Strategy and Implementation Plan] (promulgated by the St. Council, Aug. 1, 2013, effective Aug. 1, 2013), http://www.gov.cn/zwggk/2013-08/17/content_2468348.htm; see also Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Huogan Zhongda Wenti de Jueding [The Decision on Major Issues Concerning Comprehensively Deepening Reforms]

regards the “public interest,” this is unacceptable: the narrow definition may impede the effectiveness of the legislator regarding the representation of protecting fair competition in the market.²⁰³

Consequently, if restriction can be imposed on State intervention, it may leave the State’s interest within a reasonable range from the perspective of the “public interest”: the State will not do whatever it wants in the market to obtain the maximum pursuit of its own narrow interest. However, in practice, limitations on the State’s interest in the Chinese market are often inadequate. In order to develop certain industries, especially those which are concerned with the lifeline of the national economy and economic security, the State’s industrial policy favors paying much more attention to some industries,²⁰⁴ while, at the same time, the “public interest” has to unwillingly give way to the State’s interest.²⁰⁵ For example, in China, the “prosperity” of SOEs, which represent an important part of the State’s interest at present, represents some sort of unscientific growth. With the purpose of ensuring the State’s short-term economic interest, the Central Government of China chooses to develop SOEs as a matter of priority. However, such a trend seizes the most important aspect of the “public interest,” namely promotion of fair competition, without considering its functions of balancing different kinds of interests and contributing to long-term economic development. Therefore, the State’s industrial policy is unable to treat the State’s economic interest and other interests, such as consumer welfare and the interests of other competitors, equally in the

(promulgated by the St. Council, Nov. 12, 2013, effective Nov. 12, 2013), http://www.gov.cn/jrzq/2013-11/15/content_2528179.htm; Xiaohui Yu, *Introduction to “Broadband China” Strategy*, CHINA ACAD. OF TELECOMM. RES. MIIT (Sept. 5, 2013), http://file.eu-chinapdsf.org/Internet/PUB/Activity4/Results%203/Broadband%20China%20introduction_Yu%20Xiaohui.pdf.

203. See MIKE FEINTUCK, “THE PUBLIC INTEREST” IN REGULATION 225 (2004).

204. In the 1990s, such a situation also existed in the European Union. See, e.g., Claus-Dieter Ehlermann, *State Aid Control in the European Union: Success or Failure?*, 18 FORDHAM INT’L L.J. 1212, 1213 (1994); see also Hans-Jorg Niemeyer, *State Aids and European Community Law*, 15 MICH. J. INT’L L. 189, 190 (1993); see also COMPETITION LAWS OUTSIDE THE UNITED STATES 109 (H. Stephen Harris et al. eds., 2001).

205. Väilä, *supra* note 161, at 21 (“[T]he conflict is always present in strategic merger support in the absence of scale economies and in any industrial policy support that targets specific firms in a potentially competitive sector.”).

market. In the Chinese gas station sector, State intervention has helped oil SOEs to occupy a dominant position in the domestic refined oil retail market in the name of consumer welfare. However, after suffering through the *oil shortage*,²⁰⁶ besides the interests of SOEs (that almost equates to the State's economic interest in the gas station sector), privately owned gas stations and consumers have been losing their interests and welfare.²⁰⁷ In the long run, the "public interest" in having a strong competitive gas station sector has been violated by the State's short-term economic interest.

In sum, China's economic development relies on both the *Chinese Anti-Monopoly Law 2007* and the industrial policy. However, in their cooperative relationship, both the *Chinese Anti-Monopoly Law 2007* and the industrial policy meet difficulties when trying to achieve the "public interest." Without a uniform definition of "public interest" in the Chinese market, the *Chinese Anti-Monopoly Law 2007* and the industrial policies separately propose to use consumer welfare or the State's interest to replace it. This is unacceptable. For one thing, "[c]ompetition law cannot . . . be rationally implemented until it has been decided whether public policy objectives should be considered there"²⁰⁸ For another, promoting the growth and competitiveness of specific industries could lead to a distortion of competition in the market.²⁰⁹

IV. RECOMMENDATIONS

An examination of the legal framework for privately owned SMEs in China reveals that flaws in the *Chinese Law on Promotion of SMEs 2002* and the *Chinese Anti-Monopoly Law 2007*, as well as conflicts between the State's industrial policy and the *Anti-Monopoly Law 2007*, are both

206. See, e.g., Lin Boqiang, Zhongguo Nengyuan Zhengce Sikao [An Inside Look at Chinese Energy Policy] 137, 180 (2009); see also Wang Ying & Zhou Yan, *Private Fuel Stations Scramble as Diesel Supplies Tank*, CHINA DAILY (Oct. 21, 2011), http://usa.chinadaily.com.cn/business/2011-10/21/content_13946354.htm.

207. Interview with staff member of China Sinopec (the staff did not agree the researcher to use his name in any written work arising from the study, but did consent to being interviewed), in China (2012).

208. TOWNLEY, *supra* note 77, at 13.

209. See TFEU, *supra* note 93.

reasons to engender its failure. Therefore, finding a breakthrough and offering solutions would be valuable outcomes of this article.

A. The Biggest Obstacle to Chinese Privately Owned SMEs – Administrative Powers

Due to the economic situation, the Central Government of China has granted supreme power to the State's industrial policy to promote SOEs on behalf of the State's interest. Although in principle the State should maintain *social justice* in the intervention process,²¹⁰ the State cannot avoid pursuing its own desires and interests for self-improvement.²¹¹ Accordingly, privately owned SMEs cannot obtain adequate opportunities to develop, and it is difficult to make their comparative advantages shine. However, the *Chinese Law on Promotion of SMEs 2002* and the *Chinese Anti-Monopoly Law 2007* have no real functions in overcoming the State's industrial policies that grant exclusive rights to administrative agencies and SOEs,²¹² and thereby preventing such a trend and promoting privately owned SMEs.

B. The Core Task of the Chinese SME Legal Framework – Preventing the Abuse of Administrative Powers

Under the semi-government-oriented economic growth model, limiting the abuse of administrative powers should be accepted as the top priority for the legal framework for Chinese privately owned SMEs. As regards the *Chinese Anti-Monopoly Law 2007*, first of all, because there is a lack of sanctions against *inappropriate* interventions,²¹³ the *Anti-*

210. VITO TANZI, *GOVERNMENT VERSUS MARKETS: THE CHANGING ECONOMIC ROLE OF THE STATE* 52 (2011).

211. John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 179, 196 (1981).

212. Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law— Achievements and Challenges*, 1 J. ANTITRUST ENFORCEMENT 247, 264, 271 (2013).

213. Zhengxin Huo, *A Tiger Without Teeth: The Antitrust Law of the People's Republic of China*, 10 ASIAN-PAC. L. & POL'Y J. 32, 52 (2008). See [Anti-Monopoly Law of the People's Republic of China] (all articles of the Chinese Anti-Monopoly Law 2007, which relate to the abuse of administrative power, are general principles of the prohibition without any specific sanctions).

Monopoly Law 2007 cannot control SOEs and administrative agencies in the market. To provide an escape route from such a negative situation and protect privately owned SMEs, self-improvement for anti-monopoly implementation should be encouraged, for instance enhancing private anti-monopoly enforcement in China. Although private anti-monopoly enforcement brought new hope to privately owned SMEs,²¹⁴ the current private enforcement fails to compensate for the loss and cost of SMEs.²¹⁵ Thus, if enhancement is possible, it will overcome the current dilemma and increase the opposition force to administrative interventions from the public and privately owned SMEs.

Second, nowadays, linked with Chinese administrative agencies and SOEs, other market participants, who undergo inappropriate administrative directives, find it hard to be protected by the *Chinese Anti-Monopoly Law 2007* and are committed to finding close allies in the State's legal system, such as the administrative law. Because, currently,

214. See generally [Regulations on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct] (promulgated by the Sup. People's Ct., Jan. 30, 2012, effective June 1, 2012), http://www.court.gov.cn/qwfb/sfjs/201205/t20120509_176785.htm, translated in http://www.wipo.int/wipolex/en/text.jsp?file_id=343638 (China).

215. The high cost but low compensation of litigation may make potential plaintiffs in China think twice before the initiation of private anti-monopoly litigation. See, e.g., Wang Congcong & Song Ya, *Fanlongduanfa Shishi Wunian, Heyi Minshi Susong cai 200 Duoqi – Fang Guowuyuan Fanlongduan Weiyuanhui Zhuania Zixunzu Zhuanjia, Zhongguo Zhengfa Daxue Jiaoshou Shi Jianzhong* [Why Five-Year Implementation of the Chinese Anti-Monopoly Law Only Brought a Little Over 200 Civil Anti-Monopoly Cases – Interviewing Professor Shi Jianzhong, a Member of the Anti-Monopoly Committee Expert Advisory Group, working in China University of Political Science], CHINA YOUTH DAILY, Aug. 29, 2013, at 07; see also [Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conducts]; see also [Regulations on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct] (promulgated by the Sup. People's Ct., Jan. 30, 2012, effective June 1, 2012), art. 14, http://www.court.gov.cn/qwfb/sfjs/201205/t20120509_176785.htm, translated in http://www.wipo.int/wipolex/en/text.jsp?file_id=343638 (China) ("If monopolistic conduct of defendants causes losses for the plaintiffs, the People's Courts may require the defendants to stop their infringements and to compensate for damages in accordance with the law, based on the claims of the plaintiffs and the facts that are ascertained. At the request of the plaintiffs, the People's Courts may include the reasonable expenditures of plaintiffs as part of their damages, i.e. the expenditures to invest and restrict the monopolistic conduct.").

the administrative law is a useless assistant when privately owned SMEs cannot be protected by the *Chinese Anti-Monopoly Law 2007*, the cooperation between administrative law and the *Chinese Anti-Monopoly Law 2007* should be improved. The improvements should be considered on behalf of non-SOEs and focus on decreasing the frequency of the abuse of administrative powers in the market and reducing the situation of bureaucrats shielding one another. Privately owned SMEs will then obtain more opportunities for development.

CONCLUSION

Looking back over the past few decades, a number of Chinese policies (see *supra* note 12) and laws (namely the *Chinese Law on Promotion of SMEs 2002* and the *Chinese Anti-Monopoly Law 2007*) have led to the SMEs experiencing ebbs and flows in the development process. Threats often come from legal flaws in the above-mentioned Laws. When facing discrimination from administrative powers granted by the State's industrial policy, SMEs fail to receive adequate support from these two Laws.

The measures 'Several Statements of the State Council on Cultivating the Social Service System of SMEs' (2000), and 'Several Statements of the State Council on Encouraging and Promoting the Development of SMEs' (2000), which grant extra economic power to the local governments (at or above the county level) to guide SMEs,²¹⁶ sought to signal the start of a new era for SME protection in China. However, the *Chinese Law on Promotion of SMEs 2002* inherited the *government-oriented approach* that favors the urgent development of SOEs in the name of promoting SMEs. Thus, although Articles 6 and 7 of the *Chinese Law on Promotion of SMEs 2002* aim to create fair competition circumstances for SMEs by limiting the abuse of administrative power, they have no practical improvement effects because "officials shield one another."

Corresponding to gradual shifts prompted by Government's desire to move the economy to market mechanisms, legislative work on the *Chinese Anti-Monopoly Law* started in the early 1990s,²¹⁷ and finally led

216. Xiangfeng, *supra* note 29.

217. WANG, *supra* note 63, at viii, xiv–xv, 38.

to substantive change in 2007, when the first *Chinese Anti-Monopoly Law 2007* was signed.²¹⁸ However, although there is a view that “competition currently has the leading role” in China,²¹⁹ actions taken by the State pursuit of economic growth, have often cut across the *Chinese Anti-Monopoly Law 2007* being allowed to achieve its desired impact from the perspective of privately owned SMEs.

Privately owned SMEs are impossible to ignore in the *Chinese Anti-Monopoly Law 2007* because they can achieve the ultimate objective of this Law, the “public interest,” by the way of reconciling competing interests in the market (such as consumer welfare and the interests of enterprises). However, because the *Chinese Anti-Monopoly Law 2007* chooses the approach of punishment and correction²²⁰ to restrict administrative powers, the industrial policy often acts outside this Law: granting powers to SOEs and administrative agencies to limit and hinder the normal development of privately owned SMEs. Thus, privately owned SMEs may seek assistance from the Chinese administrative laws and regulations. However, to date, administrative laws and regulations have been an unhelpful approach because many administrative actions cannot be challenged by administrative lawsuits. Privately owned SMEs continually face discrimination without effective remedies.

Now that the situation has been highlighted, two important reasons provide an explanation. The first is that there is no effective sanction against inappropriate administrative interventions which interfere with the effective implementation of the *Chinese Law on Promotion of SMEs 2002* or the *Chinese Anti-Monopoly Law 2007*.²²¹ The second is that the Central Government of China has the right to influence legislative agencies in making decisions, and naturally often chooses to preserve the State’s interest as a matter of priority and urgency in the development process. However, maximizing the State’s interest cannot concurrently

218. Williams, *supra* note 66, at 108.

219. Maureen K. Ohlhausen, *Illuminating the Story of China’s Anti-Monopoly Law*, ANTITRUST SOURCE 1, 4 (Oct. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_ohlhausen_10_29f.authcheckdam.pdf.

220. [Anti-Monopoly Law of the People’s Republic of China] (promulgated by the Standing Comm. of the Tenth Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 51, *available at* http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

221. Huo, *supra* note 213, at 52.

achieve other interests in the market, such as consumer welfare, the interests of competitors, and so on. The State's interest is usually in competition with the ultimate objective of the *Chinese Anti-Monopoly Law 2007*, the "public interest." Therefore, for the sake of ensuring the development of privately owned SMEs and even the State's long-term prosperity, both the use of executive power and the State's interest in the Chinese market should be limited.

Accordingly, it is essential to identify the fact that administrative powers are the biggest obstacle to privately owned SMEs in the Chinese market. The *Chinese Anti-Monopoly Law 2007* should take them seriously. And administrative law and the *Chinese Anti-Monopoly Law 2007* should work closely together to restrict them. In brief, the Chinese SME legal framework, which has been constructed over the last ten years, has suffered partial failure and is in urgent need of improvement.

